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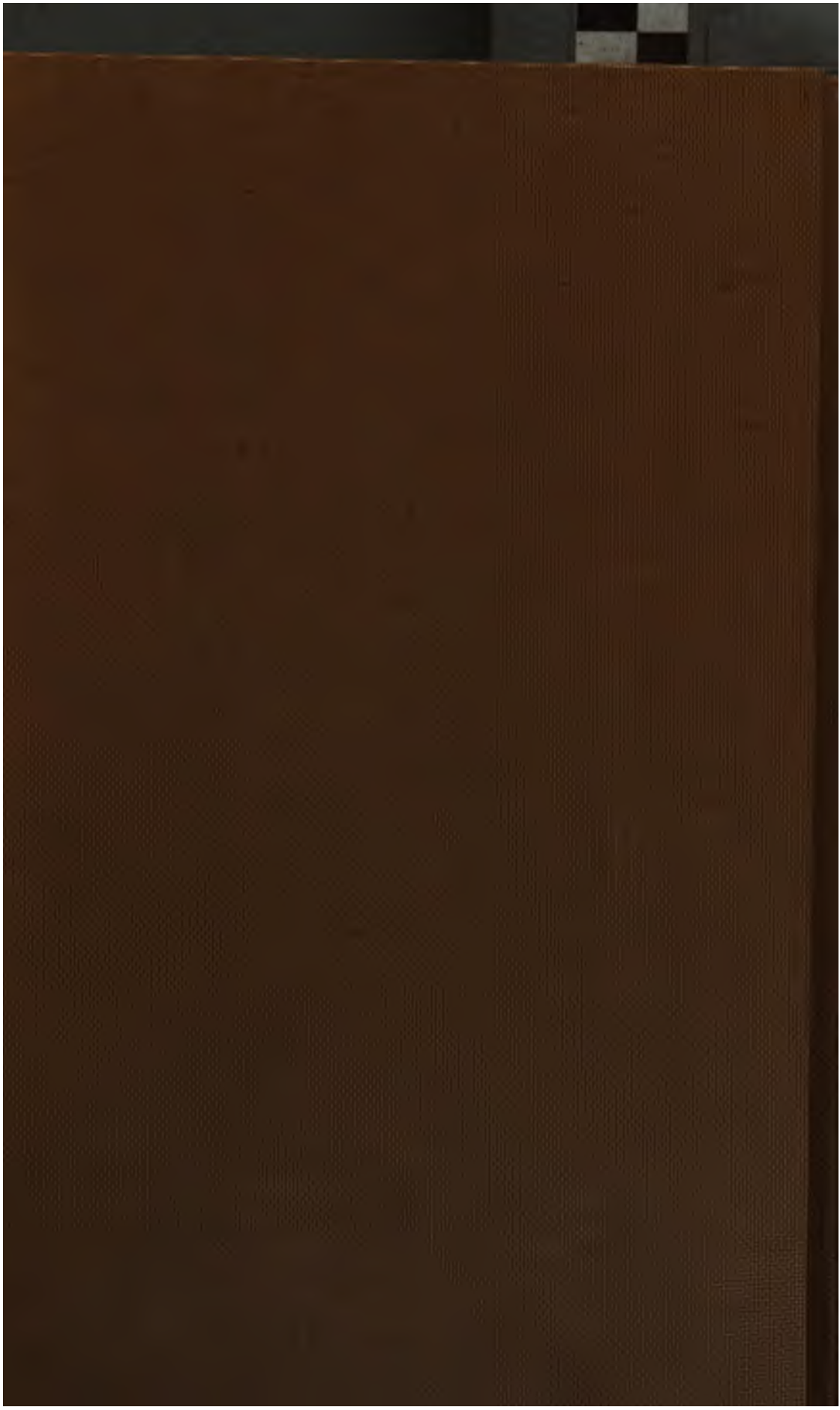

Robert J. Whitwell.

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MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

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BEING

A COLLECTION OF CASES adjudged in THE COURT OF KING'S BENCH, from the SECOND Year of WILLIAM THE THIRD, to the End of his Reign. By a late BARRISTER of the MIDDLE TEMPLE.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:

PRINTED FOR G. G. AND J. ROBINSON; E. AND R. BROOKE; J BUTTERWORTH; OGILVY AND SPEARE; AND L. WHITE, DUBLIN.

1796.

THE PREFACE.

AS theſe Reports were taken during the time LORD CHIEF JUSTICE HOLT preſided in the Court of KING'S BENCH, nothing need, nothing can be ſaid to recommend them to the Public, but that they are a faithful collection of the deciſions of difficult and important queſtions of law, in which that great man bore ſo great a part.

Many of the Caſes are reported; many of them have been kept locked up in the private ſtudies of gentlemen of the profeſſion, poſſibly with a view to their own particular benefit and reputation. Thoſe which have been reported, it is imagined, will receive ſome light from the ſame Caſes here printed; as the whole chain of arguments, the objections and anſwers of the Counſel are faithfully preſerved; by which the whole of the Caſe, and the reaſon on which the Judgments were founded, will clearly appear.

As to thoſe Caſes which have not been in print, (of which there is a very large number) it is preſumed they will be a valuable and uſeful preſent to the Public.

The juſtice, wiſdom, and unbiaſſed integrity of LORD CHIEF JUSTICE HOLT, thoſe who lived in his time were immediately ſenſible of; and to that juſtice and unſhaken integrity, and the univerſal ſuffrages of praiſe of a whole nation for ſuch a behaviour, we may poſſibly, in a great meaſure, be indebted for ſuch a ſeries of great men ſince his time, in the profeſſion of the law; not to be equalled in any former period of hiſtory, and not likely to be exceeded in future.

He has ſhewn us that real merit will make its own way without any aſſiſtance, without any little arts or aſſiduities; and that the only certain method to have a good reputation, is to deſerve it. Great and good men, who dare do right, without regard to the ſtrength of oppoſition, or the clamours of a multitude, are not only a bleſſing to the age in which they live, but to ſucceeding generations, by their being incentives to a ſimilar behaviour to poſterity.

Of this the preſent age are abundantly ſenſible, in having the ſeveral courts of judicature filled with perſons of the greateſt integrity and abilities; and ſedulouſly careful of the rights and liberties of the people; and in my judgment, HIS MAJESTY could not poſſibly have given more convincing proofs of a fixed and determined reſolution to preſerve the conſtitution and the liberties of the people inviolate, than his having appointed ſuch perſons to adminiſter juſtice, who would not, on any conſideration, either by hopes or fears, rewards or threats, be ſwerved from doing right.

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MICHAELMAS TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

* Woolbridge *againſt* Cloberry and Others.

Caſe 1.

ACTION for diverting a water-courſe from a mill againſt ſeveral, who joined in pleading *not guilty*. One of them died before verdict.

Where two defendants join in pleading, and one dies after the *venire facias*, it is error *in toto*.

S. C. Carth. 249.
S. C. 3. Salk. 117.

PER CURIAM. It is error *in toto*; for when, after joinder in pleading, one of the defendants dies after the *venire facias*, you ought to come into court and pray judgment againſt the living only; otherwiſe the writ ſhall abate (*a*).

(*a*) See ſtatute 8. & 9. *Will.* 3. c. 11. Cro. C. B. 195. Bull. N. P. 312.

Copley *againſt* Hepworth.

Caſe 2.

COVENANT to pay an annual rent of ſixty pounds and to repair. The plaintiff ſays, that the defendant entered, but does not aver a leaſe made. The defendant pleads, that he ought not to have the rent, for that no leaſe was made.

Covenant and entry amount a leaſe.

S. C. 3. Salk. 108.
See Thorpe *v.* Thorpe, 1. Salk. 171. & Roe *v.* Aſhburner, 5. Term Rep. 163.

HOLT, *Chief Juſtice*. In mutual covenants, where the performance of one depends upon the other, the precedent covenant muſt be performed firſt.

COPLEY *against* HERWORTH.

EYRE and DOLBEN, *Juſtices*. The covenant and entry amount to a leaſe; and ſo was the caſe of *Harrington v. Wiſe*.

HOLT, *Chief Juſtice*. It has been held *aliter* ever ſince.

Judgment for the plaintiff (*a*).

* [2]

(*a*) See Roe *v.* Aſhburner, 5. Term Rep. 163.

Caſe 3. Cone *againſt* Bowles.

Replevin againſt three defendants, one of whom an infant, but all appeared by attorney; judgment was given againſt the plaintiff, who aſſigned this for error; but not aſſignable for error, becauſe it might have been pleaded in abatement.

ERROR OF A JUDGMENT in replevin in the common pleas. The error aſſigned was, that three made * conuſance by attorney, and one of the avowants was an infant.

EYRE, *Juſtice*, for affirming judgment. This may be aſſigned for error, though pleadable in abatement (*a*). Where the writ is abateable generally, and the defendant pleads in bar, and judgment is againſt him, it is not aſſignable for error (*b*). An avowry is in the nature of a count (*c*). Avowry is abateable, as other declarations are; and here the avowants are plaintiffs; and though an infant cannot count by attorney, for he cannot make a warrant of attorney, yet as plaintiffs, and ſome of them of full age, they may ſue by attorney; and the plaintiff of full age may make warrant of attorney for all.

S. C. Carth. 122. 179. S. C. 4. Mod. 7. S. C. 1. Show. 13. 165. S. C. Salk. 93. 205. S. C. Comb. 100. S. C. Holt, 358. 5. Com. Dig. "Pleader" (2. C. 1).

GREGORY, *Juſtice, conceſſ.*

DOLBEN, *Juſtice, per quem*. Not error, becauſe *in autre droit*; and admitting it had been error at common law, the ſtatute of 21. *Jac.* I. c. . would have helped this caſe; for notwithſtanding that ſpeaks of *a verdict*, and ours is *a nonſuit*, yet it is within the intent of it.

HOLT, *Chief Juſtice*. This is not aſſignable for error; though an infant acts *in autre droit*, yet damages ſhall be recovered *de bonis propriis*, if judgment be againſt him; and there is the ſame reaſon why he ſhould have a guardian where the action is *in autre droit* in this caſe, as in other caſes, where infant is executor, and recovery is had againſt him (*d*). A releaſe by infant executor is void (*e*). And being joined with others alters not the caſe; for no reaſon, if all the reſt are beggars, they ſhould conclude the infant. It differs from the caſe of executors, for they muſt all join in defence, being joined in the will; and the infant executor may diſavow at full age, and not be concluded by recovery under age. But the reaſon why it is not pleadable for error is, becauſe it is pleadable in abatement; and where the time is lapſed, there ſhall be no advantage in error (*f*). And *Cro. Jac.* 5. is no law; for at that time, the court of exchequer chamber were graſping at errors in fact; and that was the reaſon of that reſolution; but no error in fact is aſſignable there, but in this court only. 1. *Roll.* 783. no law.

The judgment was affirmed.

(*a*) Cro. Jac. 5.
(*b*) 1. Roll. 181. 288. Cro. Eliz. 378. 2. Saund. 212.
(*c*) Co. Lit. 303.
(*d*) See Ruſſell's Caſe, 5. Co. 27.
(*e*) Cro. Jac. 441.
(*f*) See Caſe of Avowries, 9. Co. 80.

The

The King *againſt* Lambert. Caſe 4.

NDAMUS was awarded to reſtore *Dr. Lambert* to the :e of archdeacon of *Saliſbury*; and return, *quòd non fuit ctus*; and argued to be bad, becauſe a * negative preg- t it ought to be, *non fuit electus ut dicitur.* 1. *Sid.* 209,

Return to a *mandamus non fuit debitè electus* good.

S. C. Carth. 170.

ER CURIAM, Good; for the writ recites, *licèt fuit ctus*, and the return is a direct anſwer; and ſo held at the ie caſe reported by *Siderfin.*

Kemp *againſt* Andrews. Caſe 5.

VER the plaintiff declares, that *N. J. S.* and himſelf were ed, that the others died, and that the goods came to dant's hands, &c.

Jointenancy muſt be pleaded in abatement, and not in bar.

:fendant pleads, that they were joint merchants, and no by law amongſt them; and ſo prays the plaintiff, as to the ds, may be barred.

S. C. 3. Lev. 290. S. C. 1. Show. 188.

rer, and judgment for the plaintiff; for though no ſurvi- yet the plaintiff had right to a purpart; and jointenancy be pleaded in abatement, and not in bar.

S.C. Carth. 170. S. C. 3. Salk. 1. S. C. Holt, 545. S.C. 3. Ray. 507. 1. Vent. 34.

Vide Lev. Ent. 29. 3. Lev. 191. *Vide* 1. Saund. 291.

(*a*) Co. Lit. 182. a.

Elliot *againſt* Danby. Caſe 6.

SIGNMENT of a term of years was made by commiſſioners bankruptcy to a creditor, who, before inrolment of the ſignment, made a leaſe to the defendant, and then the deed led.

Sale by commiſſioners of bankruptcy muſt be by deed inrolled.

CURIAM. Such a leſſee cannot maintain an ejectment, he leaſe could not have been before the inrolment. The the ſtatute are, "that commiſſioners may ſell by deed in-" ſo without inrolment no ſale (*a*).

tamen 2. Co. 26. a.—See alſo the caſe of Perry *v.* Bowes, T. Jones, 196. a.

Anonymous. Caſe 7.

URIAM. An action lies againſt a common carrier for ing to carry *money*, if he do not aſſign a particular reaſon

Carrier.

Hook *againſt* Galloway. Caſe 8.

ER *de decem ponderibus*, ANGLICE "weights."

Trover *de decem ponderibus*, ANGLICE "weights," good; *aliter* in detinue.

URIAM. In trover, if the jury can underſtand it, it will though, for damages only are to be recovered therein; in detinue, where the thing itſelf is to be recovered.

EASTER TERM,

The Third of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
} *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Caſe 9.

* The King and Queen *againſt* Gilbert.

Leets by preſcription may be held at different times, and need not ſhew by what authority.

IN many places, by preſcription, leets are held at other times than within a month after *Eaſter* or *Michaelmas*.

In all leets they only ſay, "*ad cur. &c. tent.*" ſuch a day, without ſhewing their authority. It had been a good objection not to ſhew authority, if conſtant practice had not been *aliter*.

S. C. 1. Salk. 200. 1. Salk. 40. 1. Lilly, 366. Cro. Car. 46.

Caſe 10.

Crofts *againſt* Harris.

Award without performance a good bar.

AN AWARD without performance is a good bar, but not an accord without ſatisfaction. At this day the ſubmiſſion of both parties is a mutual promiſe, whereupon an *indebitatus aſſumpſit* lies.

Carth. 187.

Caſe 11.

Temple *againſt* Killingworth.

Caſe lies for ſuing in a court which has no juriſdiction.

HOLT, *Chief Juſtice*. Of late it is held, that caſe will lie for proſecution in an inferior court, where that court has not the juriſdiction. The firſt caſe in point was at *Huntingdon* aſſizes, and referred to the common pleas; and there adjudged, that to ſue a man without any cauſe of action at all no action lies, unleſs it appears to be with a malicious and vexatious deſign.

... Abr. 102. Cro. Jac. 133. 3. Peer. Wms. 104. 1. Bac. Abr. 63. Vide Hob. 267. Anonymous.

* Anonymous. Caſe 12.

A DECLARATION be part well and part ill, it ſhall be good for that which is well declared of: but if a writ of enquiry be executed for the whole, or if entire damages be given, it is good cauſe ſtay the judgment. 1. *Vent.* 27.

If on declaration, in part bad, entire damages be given, or writ of enquiry be executed for the whole, it is ill.—Heb. 189.

Anonymous. Caſe 13.

WRIT OF ERROR muſt be of a common return; if on a day certain, it is naught: where the writ of error is *ubicunque*, *ſcire facias* ought to be on a common day.

Writ of error muſt be on a common return.

Smith *againſt* Bromeley. Caſe 14.

LEASE FOR A YEAR, rent payable *quarteriatim*, and not ſaid to be at the moſt uſual Feaſts or days of payment; and avowry s made for rent due at *Feſtum Michael.* whereas it ought to have n the twenty-third of *September*, according to calculation.

Rent due 23d *September* declared of as due at *Michaelmas*, ill.

EYRE, *Juſtice.* If he had declared of a rent *arretro* at ichaelmas, it would have been well; but here it is for a rent due *Michaelmas*; therefore not good.

Dr. Needham's Caſe. Caſe 15.

I WAS MOVED, that an execution on a *ſcire facias* on the goods of *Dr. Needham* might be avoided, becauſe the writ was ſealed delivered to the ſheriff after the defendant's death; and the ute 29. *Car.* 2. c. 3. provides, "that no writ of *fieri facias*, *&c.* ſhall bind the property of goods againſt whom ſuch writ s ſued forth, but from the time that ſuch writ ſhall be delivered o the ſheriff;" and ſo provides, that the writ ſhall not bind ds againſt the party, and not, as in other caſes, againſt the purer only; and ſo *the Doctor's* goods not bound.

Scire facias ſealed after the party's death, execution thereon good.

8. Ld. Ray. 850.
7. Mod. 95.
1. Salk. 87.
3. Salk. 116.

ut PER CURIAM, This clauſe is to be underſtood of the goods purchaſer purchaſed by him before delivery of the writ; but the party, it ſhall bind as before from *the teſte*, as it was before ſtatute.

1. Sid. 29.

Caſe 16.

* Willet *againſt* Tiddy.

Officer ſued for levying taxes to have trebl coſts.

S. C. 1. Show. 214.
S. C. Carth. 288.
Cro. Car. 175. 285.
2. Vent. 45.
Dougl. 107. 245. 307. 780.

INDEBITATUS ASSUMPSIT for money received to the plaintiff's uſe. The defendant juſtifies, as collector of aid of the king by parliament given, by a diſtreſs warranted by the ſtatute, and found for the defendant; and, If he ſhall have treble coſts by that ſtatute given for being ſued in the exerciſe of his office? was the queſtion, on motion.

And it was urged, that this is not matter concerning his office, for it may be for money received to his own uſe, or for overplus of diſtreſs not returned; and whereas action was brought by preſentment in the eccleſiaſtical court againſt a conſtable, and found for him, it was adjudged out of the ſtatute of 7. *Jac.* 1. c. 5. for it does not directly touch his office. 1. *Cro.* 285. *Jones*, 305. So in an action on the caſe for falſe preſentment by a conſtable, that the plaintiff's lands were in the pariſh of *S.* it was adjudged, that he ſhould not have double coſts by the ſtatute of 7. *Jac* 1. becauſe the queſtion ariſes wholly on the place where the lands are, and not on the duty of the conſtable. 1. *Cro.* 467.

And HOLT inclined to that opinion; for if the action were brought for overplus not returned, this does not touch his office, and he does not uſe the ſtatute for defence.

But becauſe certified by the Judge of aſſize, that it was within the ſtatute, the defendant had treble coſts.

Caſe 17.

Edwards *againſt* Dickenſon.

Caſe againſt a poſt-maſter for not delivering a letter when requeſted.

CASE againſt the poſt-maſter of *Briſtol* for not delivering a letter, ſent him by poſt, upon requeſt; and demurrer.

AND IT WAS HELD, that the action was well maintainable upon requeſt and refuſal, without any particular damage having accrued, for the miſcarriage of a letter is damage; but if the defendant had tendered the letter, and the plaintiff would not pay poſtage, he is not bound to deliver the letter; but then this ought to have been ſhewed on the defendant's ſide.

Judgment was given for the plaintiff.

TRINITY

TRINITY TERM,

The Third of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Godefrey *againſt* Newton.

Caſe 18.

ERROR OF A JUDGMENT in the court of common pleas in an action of debt againſt an executor, after the leaſe was determined, for rent due in the teſtator's time on a parol leaſe.

Rent due on an expired leaſe is of equal degree with debt on bond.

The defendant pleaded an obligation entered into to *A.* by the teſtator, *ultra quod* he had not aſſets, and ſo demands judgment.

S.C. Comb. 183. Vide poſtea, Paſch. 11. *Will.* 3. Cage v. Acton. Lev. 114. Off. Exec. 209.

And on demurrer judgment was given for the plaintiff in the common pleas, and affirmed here.

For PER CURIAM, Debt for rent, upon a leaſe for years after leaſe ended, ſavours of the realty, and is in equal degree with debt upon a bond, and therefore a bond is not to be preferred to it: and ſo is *Office of Exec.* 209.

Chew *againſt* Briggs.

Caſe 19.

A TRIAL was in *Middleſex* on a traverſe in *Surrey*; and this moved in arreſt of judgment.

Trial in a wrong county aided by 16. *Car.* 2. c. 8.

And HOLT, *Chief Juſtice*, was of opinion to ſtay the judgment, for that a wrong county is not remedied by the ſtatute, but only a wrong *venue* in a right county. The words of 16. & 17. *Car.* 2. c. 8. enact, "That no judgment after verdict ſhall be arreſted or

Crew *againſt* Briggs.

" reverſed for that there was no right *venue*, ſo the cauſe be tried " by a jury of the proper place or county where the action was " laid;" theſe words are reſtrictive.

1. Vent. 22. 263.

Dolben, Gregory, and Eyre, *Juſtices*, *contra*. 1. *Saund.* 247.

Eyre, *Juſtice*. If it had been *res integra*, I ſhould be of another opinion; but all reſolutions being otherwiſe, I accord. *Sid.* 325. 1. *Saund.* 247, 248.

* [8]

Caſe 20.

* Anonymous.

Semper paratus. Poſtea, Mich. 7. *Will.* 3. Wigmore *v.* Veal. Poſtea, Mich. 9. *Will.* 3. Giles *v.* Hart.

A TOUTS TEMPS PRIST can never be pleaded after imparlance. On a bond after imparlance, you may plead tender and *encore priſt*, for no *toutes temps priſt* need be pleaded in that caſe.

Poſtea, Paſch. 12. *Will.* 3. Horn *v.* Luines.—See Tidd's Pract. 240. 379.

Caſe 21.

Anonymous.

Appearance helps a miſcontinuance, but not a diſcontinuance. See Tidd's Pract. 624.

HOLT, *Chief Juſtice*. An appearance does not help a diſcontinuance as it does a miſcontinuance; and it is a queſtion, whether diſcontinuance in proceſs be helped by the ſtatute of Jeofails, though diſcontinuance in pleading may be helped.

Caſe 22.

Anonymous.

Vide Hob. 190, 191. Poſtea, Hill. 8. *Will.* 3. Hooper *v.* Pierce.

IF AN AWARD be, that a general releaſe to the time of award may be given, a releaſe to the time of the ſubmiſſion is a good general releaſe.

MICHAELMAS

MICHAELMAS TERM,

The Third of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir William Gregory, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Anonymous. Caſe 23.

IN a *homine replegiando* one muſt plead *inſtanter* without imparlance, as in an appeal.

The King *againſt* Davis. Caſe 24.

UPON AN INFORMATION FOR A RIOT a trial was had, and a verdict given for the defendant, and a new trial * prayed for, for the king; and *Sir John Jackſon's Caſe* alledged.

No new trial on acquittal, on information, for being againſt evidence; *alter* if by fraud or ſurpriſe.

THE COURT ſaid, that was proved to be by fraud; and ſince that, in HALE's time, a new trial had been granted, the verdict being obtained by fraud; but this verdict being only againſt evidence, but no fraud, a new trial was denied. A new trial was granted in the caſe of *The Queen v. Coke*, the acquittal being by ſurpriſe upon the proſecutor, for want of notice, it being brought on by the defendant; it was in *Michaelmas Term*, in the third year of *Queen Anne*, on an indictment for keeping a common bawdy-houſe.

S. C. 1. Show. 336. 1. Sid. 149. 153. 1. Lev. 124.

Hill *againſt* Mills. Caſe 25.

THE BANKRUPTCY of an executor is no cauſe of granting adminiſtration to another. Where there is a natural diſability, there is a neceſſity of doing it, but it muſt be *ad uſum et commodum* of the executor; ſo the laſt granting of adminiſtration is a nullity, and *ipſo facto* void.

S. C. 1. Salk. 36. S. C. 1. Show. 293. S. C. Comb. 185. S. C. Skin. 299.

S. C. Holt, 305 Juſti. Inſt. lib. i. tit. 26. ſ. 12. 1. Lev. 157. 1. Sid. 280. 1. Lev. 186. 1. Sid. 293. 370. Skin. 299. Comb. 185. Poſtea, Mich. 10. *Will.* 3. The King *v.* Richard Rains.

Styrrop

Caſe 26.

Styrrop *againſt* Stoakes.

In what caſe the ſpiritual court has juriſdiction.

IF MONEY be diſburſed by churchwardens for repair church, or anything elſe merely eccleſiaſtical or ſpirit ſpiritual courts ſhall allow their accounts: but if there be a elſe that is an agreement between the pariſhioners, the ſuc churchwardens may have an action of account at law, and th tual court has not juriſdiction.

Caſe 27.

Stockwell *againſt* Colliſon.

Commiſſioner intitled to fees on a *quantum meruit*.

S. C. 1. Show. 342.
S. C. Salk. 330.
S. C. Comb. 186.
S. C. Carth. 208.
S. C. Holt, 7.
Show. 77.
Stra. 747.

ASSUMPSIT, on conſideration that he had aſſumed to defendant as commiſſioner to examine witneſſes in a tween him and *B.* that the defendant promiſed to pay him pains.

It was alledged, that a commiſſioner could not have an on ſuch a promiſe, for he ought to be indifferent, and it is u to be paid for ſuch ſervice; as a promiſe, in conſideration plaintiff would take a ſpecial warrant and arreſt to pay ſuc is void *(a)*. If a man, in conſideration of money, undertal execution, it is not good *(b)*.

* [10]

But PER CURIAM, * A commiſſioner is named by th and it is intended he would favour him; and therefore it is lenge to the favour that he is a commiſſioner at the denor of the party, though no principal challenge *(c)*; and a comm takes pains to attend the examination of witneſſes, and t deſerves recompence as well as a commiſſioner of bank and there is a difference between him and a ſheriff *(d)*.

Judgment for the plaintiff.

(a) Noy, 78.
(b) Cro. Jac. 103.
(c) Co. Lit. 157.
(d) See Stoteſbury v. Smit 924. S. C. 2. Bl. Rep. 204.

Caſe 28.

Jones *againſt* Beau.

Office of regiſter of *Landaff* may be granted to two.

S. C 4. Mod. 16. 29. 27.
S. C. 2. Salk. 465.
S. C. 1. Show. 288.
S. C. Carth. 213.

ON AN ISSUE out of chancery it was found, that the b *Landaff*, in *Wales*, in the year 1671, granted the offi regiſter (which was ſeveral times granted to two ſince th of 1. *Eliz.* and no grant to one only proved before the ſta *Sir R. Floyd* and the plaintiff; and the plaintiff claimed t by force of the grant.

And it was agreed, that if ſuch grant to two had been common law, it would not be defeated by the ſtatute, for it grant to two where the uſage had been ſo; and the conſta ſince is good evidence of its having been ſo before.

But it was argued, that ſuch a grant had been void at law; for this is a judicial office, which cannot be grante in reverſion *(a)*. The office of Chief Juſtice is not g to two.

(a) 11. Co. 4.

But PER CURIAM *contrà*. A judicial office may be granted to two as well as a miniſterial one; and no inconvenience more in the one caſe than in the other; the office of a Judge may be well granted to two. If theſe two chancellors differ, the biſhop may ſit himſelf, and their authority ceaſes. Jones *quing* Bean.

The College of Phyſicians *againſt* Baſſet. Caſe 29.

IN AN ACTION for practiſing phyſic without licence, the declaration laid it to be "at *Weſtminſter*, *in Com. Midd.*" but not that it was within ſeven miles of *London*; and therefore bad. Pleading. S. C. 4. Mod. 47. 5. Mod. 327. 1. Ter. Rep. 148.

Anonymous. Caſe 30.

A SHERIFF cannot return a *reſcous* upon a writ of execution. 2. Vent. 22. 2. Rol. Ab. 459. pl. 2. 3. Lev. 46.

Anonymous. Caſe 31.

PER CURIAM. Where there are ſeveral executors, and only ſome of them appear and plead, judgment muſt be againſt * them all; but execution *de bonis propriis* ſhall go againſt him that has appeared. Executors. * [11]

Item, Submiſſion to award by executor is a *devaſtavit*.

Germin and his Wife *againſt* Orchard. Caſe 32.

TRESPASS for breaking the plaintiff's cloſe. The defendant pleaded, that *J. S.* was ſeiſed of the place WHERE in fee, and being ſo ſeiſed demiſed it to the plaintiff's teſtator for a certain number of years, &c. and that the teſtator by deed aſſigned it to the defendant. And to another part of the place WHERE, &c. he pleaded another plea. To which the plaintiff demurred, having traverſed the aſſignment, and a *venire facias* was awarded, "*tam ad* "*triandum exitum prædictum, quàm ad inquirendum de damnis*," in caſe judgment ſhould be for the plaintiff upon the demurrer. Grant of a term for years to a man, *habendum* after the death of the grantor, the term paſſes preſently, and the *habendum* is void. S. C. 1. Salk. 346. S. C. 3. Salk. 222. S. C. Skin. 538. S. C. Holt, 332. S. C. 1. Freem. 500.

The jury found a ſpecial verdict, that *B*, by deed, reciting, that whereas *J. S.* had demiſed ſuch a houſe to him, and land, &c. he granted and aſſigned to the defendant the ſaid houſe and all other the premiſes and appurtenances, together with the ſaid recited leaſe, and all writings and evidences concerning the ſame, to have and to hold from and after the death of the aſſignor and his wife, for and during the reſidue of the ſaid term unexpired; *et ſi Cur.* it is a good aſſignment for the plaintiff, *ſecus* for the defendant; and aſſeſs damages, &c. but aſſeſs no damages on the demurrer, for on that there was a *nolle proſequi* entered.

SIR BARTHOLOMEW SHOWER. This is no good aſſignment. The office of *premiſes* is to aſcertain the eſtate intended to paſs in the *habendum*; but though the premiſes do make the eſtate certain,

GERMIN AND HIS WIFE *againſt* ORCHARD.

certain, yet it may be utterly defeated by the *habendum*; an therefore here the *habendum*, limiting the commencement of th leaſe to be from the death of the aſſignor and his wife, defeats th premiſes. A leaſe for years ſhould have a certain commencemen and ending, otherwiſe it is void (*a*); and here the time of th aſſignor's death is not known; and an *habendum* not only alters an abridges, but ſometimes wholly fruſtrates the premiſes. A feoff ment to *A. habendum* after the death of the feoffor, is void (*b*) True it is, that if a grant be complete in the premiſes, a contra dicting *habendum* ſhall be rather void than defeat it (*c*). And if i be objected, that all the term is granted here in the premiſes by th words, "the ſaid recited leaſe;" it may be anſwered, that by th * [12] word * "leaſe" the term is not extended, but the deed indente only, becauſe of the words ſubſequent, "all the writings and evi "dences."

It was argued likewiſe, that the verdict was good, notwithſtand ing the omiſſion of enquiring of damages on the demurrer; for a to that, it is but an inqueſt of office, and may be ſupplied by anothe writ (*d*). But if the verdict would have been deficient for this cauſe, it is aided by a *nolle proſequi*; for where a verdict is inſuffi cient, by aſſeſſment of entire damages, or non-aſſeſſment of damages and coſts where they ought to be aſſeſſed, it cannot be ſupplied by a writ of enquiry; but releaſe of damages and coſts remedies ſuits and imperfection in the verdict.

CONTRA. The word "leaſe" contains all his intereſt in th land, and not the deed indented only; for if the indenture wer intended to be conveyed only, it might have been by the othe words, "all writings, &c.;" and then the word "leaſe" ought t carry the term, otherwiſe it will be of no uſe; but ſuch conſtruc tion ought to be made as *accipiantur cum effectu*; and the wor "leaſe" comprehends all his eſtate in the lands. A man plead ed that he had ſurrendered *dimiſſionem præd.* and it was conſtrued ſurrender of his intereſt (*e*). Then all his intereſt being given i the premiſes, the *habendum* being contrary is void (*f*). And if th aſſignment be good, the verdict is void; for if the jury had foun exceſſive damages on the demurrer, attaint would lie againſt them and in all caſes where attaint would lie againſt the petit jury fo exceſſive damages, there, if no damages be aſſeſſed, ſuch an omiſſio ſhall not be ſupplied by a new enquiry (*g*).

PER CURIAM. This aſſignment is void; for if a man grant a leaſe for years, *habendum* after death, it is void.

EYRE cited a caſe to the contrary (*b*).

(*a*) Co. Lit. 45.
(*b*) 3. Cro. 254.
(*c*) Hob. 170. Dyer, 272.
(*d*) Dyer, 135. 12. Co. 6.
(*e*) See the caſe of Peytoe v. Pemberton, Cro. Ca. 101.
(*f*) 1. Co. 155.
(*g*) 11. Co. 119. 2. Roll. Abr. 721
(*b*) 2. Roll. Abr. 66.

Bu

But it was denied by HOLT, *Chief Juſtice*, and not minded by the others; and a diverſity was taken, where one grants his term for ſo many years as ſhall be arrear after his death, and a grant of his term for four or more years in certain, *habendum* after his death, the firſt is void, the ſecond good (*a*). And the verdict is inſufficient, and ſuch inſufficiency not aided by a *nolle proſequi*.

GERMYN AND HIS WIFE *againſt* ORCHARD. 1. Vent. 83.

And judgment was given PER TOTAM CURIAM, that the aſſignment was not good.

This judgment was reverſed in the exchequer-chamber, and that reverſal affirmed in the lords.

(*a*) 1. Co. 155.

* The King and Queen *againſt* Evans.

Caſe 33.

MANDAMUS to reſtore *Evans* to the office of clerk of the peace.

Clerk of the peace not removeable but for miſdemeanor.

A miſbehaviour was returned, *viz.* that a demand being made of THE ROLLS, he did not deliver them to the *cuſtos rotulorum*.

S. C. Holt, 188. S. C. 4. Mod. 31. S. C. 1. Show. 282.

And a *peremptory mandamus* was moved for; for the ſtatute 1. *Will. & Mary* veſts a freehold in the clerk *quamdiu ſe bene geſſerit*; they are to remove him but on miſdemeanor in the execution of his office; and articles againſt him are to be put in writing; which is not ſaid to have been done.

Poſtea, Trin. 5. *Will. & Mary*, Harcourt v. Fox.

HOLT, *Chief Juſtice*. The keeping of rolls does of right belong to the *cuſtos rotulorum*: the clerk of the peace is a diſtinct officer, and not a mere ſervant; and his buſineſs is to make up THE ROLLS, and enter them.

Poſtea, Trin. 10. *Will.* 3. Saunders v. Owen.

A peremptory *mandamus* was granted.

Parker *againſt* Winch.

Caſe 34.

HOLT, *Chief Juſtice*. An antient demeſne manor is impleadable at common law, but the lands holden of the manor are only impleadable in the court of the manor; and laying it in the declaration to be part of the manor, ſhews it not impleadable in the court of the manor; for land holden of the manor cannot be ſaid to be part of the manor (*a*).

Antient demeſne manor impleadable at common law; lands held of it pleadable at common law.

EYRE, *Juſtice*. The rent may be parcel of the manor, and ſo may the ſervices, though the land is frank-fee; and whatever is holden of the manor is not part.

S. C. Comb. 186. S. C. Salk. 56. S. C. 3. Salk. 34. Vide Reg. f. 4. b.

(*a*) See Doe on the demiſe of Ruſt v. Roe, 2. Burr. 1046.

Coke *againſt* Hawkins.

Caſe 35.

MOTION for a prohibition to the ſpiritual court for a ſuit for defamation, and it being after ſentence it was denied, becauſe they had not pleaded to the juriſdiction of the court. *Quære.*

Prohibition to the ſpiritual court, on ſuit for defamation, not granted after ſentence.—S. C. 1. Show. 337. Cro. Car. 110. 3. Lev. 319. 2. Mod. 221. 1. Vent. 61. Salk. 692. Stra. 823. 4. Com. Dig. 508. 2. Term Rep. 473.

The

Case 36.

The King *againſt* The Inhabitants of Hornſey.

Highways.
S. C. Fort. 254.
S. C. 1. Show. 290. 291.
S. C. 4. Mod. 38.
S. C. 10. Mod. 150.
S. C. Holt, 338.
S. C. Carth. 212.

HOLT, *Chief Juſtice.* Upon a preſentment for not repairing highway, on not guilty, you cannot give anything in evidence but only that the way is repaired. If they plead that they ought not to repair, they muſt ſet forth who ought. You cannot give in evidence "no highway," but may traverſe it.

EYRE, *Juſtice, contra.*

DOLBEN, *Juſtice.* They may give in evidence that it is no highway, but not that they ought not to repair (*a*).

(*a*) See Rex v. Juſtices of Wiltſhire, 3. Burr. 1530. 2. Hawk. P. C. ch. 76. Rex v. Weſton Penyard, 4. Burr. 2507. Rex v. Great Broughton, 5. Burr. 27 Cowp. 648. 3. Term Rep. 265.

HILARY TERM,

The Third of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Cudlip *againſt* Rundall.

Caſe 37.

CASE. The plaintiff declares, that being poſſeſſed of a houſe, with the appurtenances, the twenty-fifth of *March*, 36. *Car.* 2. for a term of years then and yet unexpired, by indenture demiſed them to the defendant for ſeven years next enſuing, who entered and was poſſeſſed, *et ignem ſuum in domo præfata tam negligenter cuſtod.* that on the eighth of *November* the houſe was burnt, *ad damnum ſuum* of three hundred pounds. The defendant pleads, *non dimiſit modo et formâ.* Iſſue is joined; and a ſpecial verdict, that the plaintiff was poſſeſſed, and the twenty-fifth of *March*, 36. *Car.* 2. demiſed by indenture to the defendant "all that one meſſuage, &c. together with all houſes and out-"houſes to the ſame belonging, excepting and always reſerving "out of the ſaid demiſe to the plaintiff, his executors or admi-"niſtrators, the houſe commonly called *the New Houſe*, new "built upon the premiſes, for the uſe only of the father of the ſaid "plaintiff, the ſaid plaintiff, their wives and families, to live in "as they pleaſe, but not to be let to any perſon or perſons whatſo-"ever; and all other times when they ſhall not dwell there, to be "uſed by the defendant, his executors, adminiſtrators, and "aſſigns, to hold the premiſes, except as before excepted, to the "defendant for ſeven years;" that at the time of the leaſe there were two manſion-houſes on the premiſes, one old one, and one new built; that the new built houſe was only burnt; that at the time

Where part of a thing demiſed in general words is well excepted by particular words.

S. C. 4. Mod. 9. S. C. 1. Show. 310. S.C. Carth. 202. S.C. Comb. 177. S. C. 3. Salk. 156. S. C. Holt, 410. Co. Lit. 47. Cro. Eliz. 6. 372. 527. Shep. Touch. 78.

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S. C. 4. Mod. 9. S. C. 1. Show. 310. S.C. Carth. 202. S.C. Comb. 177. S. C. 3. Salk. 156. S. C. Holt, 410. Co. Lit. 47. Cro. Eliz. 6. 372. 527. Shep. Touch. 78.

CUDLIP *againſt* RUNDALL.

time of the fire the defendant was in poſſeſſion of the new houſe, except one room which the plaintiff had, and that the was * burnt by fire negligently kept by the defendant in th

*[15] of the houſe in his poſſeſſion. *Et ſi, &c.*

No action on the caſe lies for tenant at will's negligently keeping his fire.

And it was agreed in this caſe, that no action on the ca againſt a tenant at will for his neglect in the cuſtody of his fi which his houſe was burnt. 5. *Co.* 13. *b.*

See 1. Bl. Com. 431. 1. Bac. Abr 55. 242. 2. Wilſ. 145. Dougl. 183. 1. Term Rep. 430. 535. 2 Term Rep. 166. 232.

So THE SOLE QUESTION here was, if the defendant wa than a tenant at will of the new houſe; and if the houſe w miſed to him for ſeven years.

Et PER CURIAM *ſeriatim*, It is not; for the leaſe is m the meſſuage, &c. except the new houſe, ſo that it is excep expreſs words in the premiſes, and alſo in the *habendum*, wh not contrary or repugnant to the premiſes; for there was a houſe demiſed, which ſupplies the words, "together with al "houſes;" and where the exception does not defeat the gr is contrary to it, it muſt ſtand; as *Dyer*, 264. *b.* *Hob.* And if the exception be good, then the queſtion will be, i not avoided by theſe words, "reſerving to the plaintiff, his "tors, &c.;" for an exception out of an exception puts the at large.

Et per HOLT, *Chief Juſtice*, If a man leaſe his houſes, e ing his new houſe, during the term, this exception is goo if he except it during life, it is void: or if a man, having of two houſes for certain years, grant his houſes, excepting them, for life, this exception is void; for the words "durin qualify the exception, and ſhew his intent, that the on ſhall not be excepted during the whole term, and ſo is void; difference appears in *Dyer*, 264. *b.*; but here the new houſ cepted to the leſſor, &c. which makes a full exception; a words, "to the uſe of him only, &c." do not qualify, but declare the intent of the exception.

Vide 1. Vent. 78. 106.

Judgment for the defendant.

In this caſe the plaintiff did not aver that the leaſe was not at the time of the fire.

Caſe 38. Meggadow *againſt* Holt.

Bills of exchange. S. C. 1. Show. 317. S. C. Holt, 113. Kyd on Bills, 116. 1. Term Rep. 167. 2. Term Rep. 713.

ACTION was brought upon a bill of exchange, in wh plaintiff declared, that the defendant drew a bill of exc according to the cuſtom of merchants, on *W.* merc *Rotterdam*, payable to *H.* within two uſances and a ha alledged them to be at *Rotterdam* two months and a hal alledges the cuſtom, that if ſuch a bill be proteſted for non-p the drawer is liable; the bill is aſſigned over, and alledge tendered to *W.* and that he did not pay. The plaintiff pr and brought his action againſt *Holt*.

PER CURIAM, Judgment for * the plaintiff. First, of merchants is *jus gentium*, and part of the common therefore we ought to take notice of it, when ſet forth ig (*a*). The law of merchants in this caſe is, that › has ſuch a bill lapſe his time, and do not proteſt or equeſt, if any accident happen by this neglect in prejudice wer, he hath loſt his remedy againſt him; but if ſuch a happened, it ought to have come of the other ſide; ieing ſo, we muſt judge on the declaration. It is not to ſhew the cuſtom of merchants, but it is neceſſary to the uſance ſhall be intended, becauſe it varies as places

MEGADOW *againſt* HOLT.

(*a*) Co. Lit. 11. 182.

Potter *againſt* James.

Caſe 39.

TIPSIT *pro den. debit. et inſolut.* is not good, without ſetforth a contract, or for what the money was due.

S. C. 1. Show. 347. S.C. Comb. 187.

Poſtea, Paſch. 13. *Will.* 3. Palmer *v.* Stavely.

Anonymous.

Caſe 40.

RE there is a falſe capture of goods at ſea, the admiral has ſdiction; and if they be brought to land, the common law the cauſe may be brought in either place, at the plaintiff's

On falſe capture at ſea, the admiral has juriſdiction.

Anonymous.

Caſe 41.

NISTRATION may be granted to the next of kin, or : wife or next of kin to the inteſtate, as the ſpiritual judge ne wife ſhall come in for a ſhare by the new ſtatute; :reditors, they are all one adminiſtrator; the Court may adminiſtration, or give it all away as they pleaſe. But id ſhall have adminiſtration of the wife before all others; as credits.

Adminiſtration may be granted to the next of kin or to the wife.

Poſtea, Hill. 13. *Will.* 3. Blackborough *v.* Davis.

Fiſher *againſt* Baſton.

Caſe 42.

T OF A JUDGMENT given in an inferior court, "*per ſcball. hic in cur.*" and affirmed; for though if it be "*per ll.*" only, without more, it would be ill, becauſe it might ern or other place, yet being ſaid "*in cur.*" ſhews it to t judicially.

Inferior court.

Case 43. * The King and Queen *againſt* The Mayor of London.

Mandamus to reſtore him to the place of alderman of the city of *London*.

S. C. 1. Show. 263. 274. S.C.Carth. 217. S. C. Skin. 293. 310. S. C. Holt, 168. 310.

A MANDAMUS to the mayor and aldermen of *London* to reſtore *Sir J. Smith* to the place of alderman there. They return, that *Sir J. Smith*, the thirteenth of *February*, was an alderman of the city, being before that time duly elected and admitted into the office, according to the cuſtom of the ſaid city; and that he ſo continued from the thirteenth of *February* to the making of the act for abrogating the old oaths and appointing new ones, and from thence to the firſt of *Auguſt* next following; but that he did not take the oaths appointed by that ſtatute, nor hath ſince been choſen into the place of alderman; and therefore his office being void by his not complying with the act, they cannot reſtore him.

The difficulty reſted ſolely upon the ſtatute for reverſing the judgment given in the *quo warranto*, and whether this return was not contrary to it; for if by that judgment there recited the corporation was diſſolved, then the return of his being alderman is frivolous, and he not obliged to take the oaths, not being an officer at that time, till reſtitution of the liberties of the city by the act that was made after.

Return muſt be taken as true till falſified.

EYRE, *Juſtice*. The return is ſufficient; for it muſt be taken for true until the party falſifies it by bringing an action, unleſs anything in the act of parliament alters the caſe; for the Judges are obliged to take notice of it, being declared a public act, and nothing is in it to make the return contrariant. The judgment entered in this caſe was very different from what is recited in the act; but the Court takes notice of it only as it is there recited, which is, "That the "liberty, privilege, and franchiſe, of the mayor, and commonalty, "and citizens, being a politic body, and corporate, ſhould be ſeized "into the king's hands:" by which judgment the corporation is not diſſolved, ſo that *Sir J. Smith* continued ſtill an alderman of that body. The judgment in the moſt ſenſible terms is a ſeizing of the corporation into the king's hands, which could not be; for that reſts ſolely in intendment of law, and is inſeparable from the members; and what the king cannot have, judgment of ſeizure cannot give him. 2. *Cro.* 260. The judgment here ſhould have been a judgment of ouſter; and this is ſuch a judgment as is without precedent, which makes ſuppoſitions. There are ſeveral judgments for ſeizing of franchiſes, but never for * ſeizing of corporations; the corporation is always ſuppoſed to be prior in law (*a*). If a corporation may be ſeized *nomine diſtrictionis*, or otherwiſe, it is diſſolved; for when it is merged in the crown, the king may make a new one, but cannot reſtore the old. A corporation is ſomething beſides franchiſes, for it is a capacity to hold as a natural body; and though it may ceaſe to be *in actu exercito*, yet it may be *actu ſignato*. Neither does a ſeizure of office diſſolve one; for on making a corporation, the king may reſerve the naming of

*[18]

Judgment may be of ſeizing of franchiſes, but not of corporations.

(*a*) Palm. 1.

officers

officers to himſelf, and ſuſpend it for a time. And it not appearing by the preamble what the franchiſe is that was ſeized, it muſt be taken for truth that he continued an alderman; and he is not helped by the other clauſes.

THE KING AND QUEEN *againſt* THE MAYOR OF LONDON.

GREGORY, *Juſtice*. The Court cannot take notice of any other judgment but what appears by the preamble.

DOLBEN, *Juſtice*, doubted. If the return be true, they cannot reſtore *Sir J. Smith*; the only difficulty is, whether it be poſſible to be true or not. Franchiſes that remain in the king may be ſeized; the parliament does not declare it null from the beginning, but only illegal. If it had been "liberties, &c." *Sir James Smith* ſhould have been reſtored; but here it is only "*præd.* "liberty," but the enacting clauſe is poſitive; *ideo dubitat*, and not willing that a peremptory *mandamus* ſhould go.

HOLT, *Chief Juſtice*. The writ is, that he was duly elected an alderman *ſecundum antiquas conſuetudines civit. præd.* The return agrees with the writ, that he was elected, but that he did not take the oaths. If this act had not been in the caſe, undoubtedly this had been a good return. In this act, by the word "officers" aldermen without doubt are underſtood; but if the return be contrary to the act, it muſt be rejected. If the king ſhould now make ſuch an officer as an alderman, it would not be good, for the law underſtands no ſuch officer but of a corporation. By the judgment, as recited, the corporation is not diſſolved. It was a *quære*, whether a corporation could be diſſolved; but ſurely it may. It is ſuch a franchiſe as may be forfeited; but a judgment of ſeizure is no proper judgment to diſſolve a corporation. There are three ſorts of liberties: Firſt, that which did exiſt in the crown before, as felons goods; ſecondly, created *de novo*, which exiſt though forfeited, as leet, market; third ſort, which cannot exiſt but in perſons; and in that laſt, judgment ought only to be for ouſter, for the king cannot have it himſelf: but judgment final, that the liberties ſhall be ſeized and forfeited, will ouſt * them of franchiſes. Here it does not appear that any judgment was actually given that the franchiſe, being a body politic, ſhould be ſeized: the liberty of the mayor is not the being of the mayor; by a ſurrender of liberties and privilege, the corporation is not diſſolved. 3. *Co. Dean and Chapter of Norwich's Caſe*, *Jo.* 165. He agreed, that if a corporation were made to a particular purpoſe, and they deveſt themſelves of all right, ſo that they cannot anſwer the end of their inſtitution, it is thereby diſſolved; as in the caſe of a private corporation for charity, before the Reſtraining ſtatute: but if the end of a corporation remained, as in a borough to make by-laws and governing it, the corporation remains ſtill, and the making of by-laws is no franchiſe but part of the conſtitution; and ſo as the matter ſtands no peremptory *mandamus* (*a*).

Vide 9. Co. 25.

* [19]

If a corporation be made to particular purpoſe, and the purpoſe for which they are created ceaſes, it is diſſolved.

(*a*) See S. C. 1. Show. 264. 2d edit. *mis.*

EASTER TERM,

The Fourth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Caſe 44.

Hare *againſt* White and his Wife.

Baron and *feme.*

TRESPASS againſt huſband and wife. Upon general iſſue, the huſband is acquitted, and the wife found guilty.

And it was moved, that the huſband ſhould have been joined only for conformity; and there is a writ in *the Regiſter* to that purpoſe, 105. *b.* which ought to be purſued; and ſo is *Yelv.* 106.

But CURIA *contra*; for there is no diverſity in the caſe of *baron* and *feme*, and where treſpaſs is againſt any other two, and one of them is found guilty. *Cro. Jac.* 203.

* [20]

Caſe 45.

* The King *againſt* ———.

Order of ſeſſions on appeal is final.

PEMBERTON moved to quaſh an order of two juſtices of peace made at their ſeſſions, which reciting a precedent order made by two juſtices to remove a poor man from *H.* to *B.* in the ſaid county, becauſe it appeared to them that he had rented a farm of ten pounds a-year in *H.* ordered he ſhould be ſettled at *H.*; and moved to have the matter examined here.

But TOTA CURIA *contra.* But they agreed, that in all caſes where a ſtatute gives appeal from two juſtices to the ſeſſions, the order

ler on ſuch appeal is final, though the ſtatute do not expreſsly ſo: and this Court cannot examine the fact, but only quaſh the ler, if contrary to law on the face thereof.

THE KING *againſt*

And *per* DOLBEN, *Juſtice*, If a conviction be on the ſtatute of er-ſtealers, the fact cannot be afterwards examined here, for the rliament has made the juſtices ſole judges of ſuch petty matters.

Then SHOWER moved to quaſh the order, becauſe the ſeſſions ght only to quaſh or confirm the order of juſtices; yet they have it reverſed the former order, but ordered a ſettlement at *H.* with- it more ado.

But by DOLBEN, *Juſtice*, and EYRE, *Juſtice*, The ſettlement *H.* being the place from whence he was removed, is a reverſal the firſt order.

But HOLT, *Chief Juſtice*, thought they had not power to ſettle m at *H.* becauſe it did not appear he had been ſettled there forty ys; for though he had a farm there, yet it is not a ſettlement if leave it within forty days. Then the ſeſſions ought to have aſhed the firſt order, but not to ſettle a poor perſon who had no ttlement.

But the other Juſtices *contra*, *abſente* GREGORY, it was con- rmed.

Loowder *againſt* Screwdens. Caſe 46.

N an appeal of murder the plaintiff counts at bar *in propriâ perſonâ*, but the roll put into court, where the count was entered, as *by attorney*.

In appeal, the plaintiff muſt appear in perſon; if not, he may be demanded and nonſuited: but the appeal may be altered according to the truth of the fact before it be filed.

An exception was taken, that the appellant was nonſuited, for at he appeared *by attorney* where he ought to come *in perſon*; nd ſuch appearance is void, and ſo nonſuit by default; and if not nonſuit, the appeal is diſcontinued, for he ought to appear * *in- anter*, which he has not done; for at the day of the return of the rit the appellant ought to have counted *inſtanter*, but his count as *by attorney*, which is no count; and then the appeal is diſcon- nued: as if a woman bring an appeal *de morte viri*, and at the day f the return the parties appear, but at the day the ſheriff *non miſit reve*; wherefore the plaintiff prayed an *alias*, but the appellee de- anded a count; and becauſe ſhe refuſed, the appellee was diſ- arged (*a*).

* [21]

S. C. 4. Mod. 99. 1. Salk. 64. Dyer, 120. Latch, 173. 1. Bac. Abr. 186.

CURIA *contra*. The appellant here ſhall not be nonſuited, for one can be nonſuited that is not demanded; but he was not de- anded, wherefore appearance by attorney cannot be a nonſuit (*b*). n an APPEAL OF MAYHEM the plaintiff came *by attorney*, which

(*a*) Eaſter Term, 33. *Hen.* 6. Roll 39. Caſtil App. 46. cited in the caſe of Eger- ton v. Morgan, 2. Bulſt. 71.

(*b*) 2. Inſt. 313.

LOWDER *againſt* SCREWDENS.

could not be, and the plaintiff was demanded, and for default nonſuited; but there it is plain, that if he had appeared on demand, he could not have been nonſuited: ſo here, if the appellee would nonſuit the appellant, he muſt have demanded him; but here the appellant was preſent, and viewed by the court, and ſhall not be nonſuited if demanded at a day he is not demandable at. Then as to the *diſcontinuance*, that cannot be before imparlance; but the day the Court took to adviſe ſhall not make a continuance, but ſhall be intended the firſt day. It is true, the appellant had a day by THE ROLL and by the writ, and on every one of them is demandable. In the caſe in *Raſtal*, he came on the day by the roll, and becauſe he refuſed to count, the appeal abated; here he appears on the day given by the writ, and has counted, and that *in propriâ perſonâ* as he ought; and though THE ROLL be "*per attornat.*" that ſhall be altered: though an appeal cannot be altered at common law, nor by any ſtatute of *Jeofail*, yet it may be altered according to the truth of the fact before it is filed or becomes a record.

Whereupon THE ROLL was amended, and the defendant pleaded "not guilty."

And it was ſaid in this caſe, that where the grand jury or inqueſt finds a man guilty, he is ouſted of battail on appeal.

Caſe 47.

Ferrers on the Demiſe of Upton *againſt* Miller.

In ejectment, a plea in abatement "*venit et defendit*," without ſaying "*vim et injuriam*," is good, if the plaintiff receive it.

IN EJECTMENT, the defendant pleaded *in abatement*, that the land was *ancient demeſne*, without making a defence; for he ſaid, "*venit et defendit*," without ſaying "*vim et injuriam, &c.*" and no pleading can be, unleſs he make himſelf a party by defence (*a*), unleſs it be in *an aſſize* or *ſcire facias*, for there no defence is to be made; but in all * perſonal actions the plea ſays, "*venit et defendit vim et injuriam, &c.*" though it be uſual in pleas in abatement to leave out the word "*quando.*"

*[22]

BUT *on the other ſide* it was ſaid, the precedents were both ways.

S. C. 1. Show. 386. S. C. 1. Salk. 217.

AND IT WAS ADJUDGED good without "*defendit vim* (*b*);" but unleſs he make himſelf a party to the writ, by making defence, you are not bound to receive his plea; but if you do, it it is good.

S. C. Carth. 220. S. C. Holt, 219. 3. Lev. 182. 1. Brownl. 57. Dyer, 157. Cro. Eliz. 816. Stiles, 273. Lutw. 7. 4. Bac. Abr. 35.

(*a*) Co. Lit. 127. b.

(*b*) But by BULLER, *Juſtice*, in the caſe of Thompſon *v.* Stockdale, Hilary Term, 23. *Geo.* 3. it is now ſettled, that in all *dilatory pleas*, except ſuch as go to *the juriſdiction*, a *full defence* muſt be made. 1. Ld. Ray. 117, *notis*.

The

The King and Queen *againſt* Warrington. Caſe 48.

FORMATION againſt the defendant for a riot in *Cheſter*, hich is a county-palatine, and therefore to be tried there.

nd a ſuggeſtion being entered on THE ROLL, that the ſheriff of affinity with the defendant, the *venire facias* iſſued to the ſheriff only, and a jury returned; and the defendant found *ilty*, and the record removed hither.

WAS MOVED *in arreſt of judgment*, that the *venire* was ill ted, for it ought to have been to the coroners.

OLT, *Chief Juſtice*, delivered the opinion of the Court. The re is well, and the trial good; and ſo adjudged before in the of *Sir D. Rich v. Sir Tho. Player (a)*, where the *venire* was ted to *Sir D. North* only, the other being a party; for the ſhe- s the proper officer to whom the return of the writ belongs; he law does not commit it to others without default or partia- uſpected, and then conſtitutes the coroner; but where there wo ſheriffs, and only one of them ſuſpected of partiality, and iis defect is challenged, his companion is as proper a perſon to y that defect as the coroner. But it is ſaid, both ſheriffs make ne officer, yet every one of them is a ſheriff; the coroners ut one officer, yet if there be two coroners, and one of them allenged, and if four, and three be challenged, the *venire* ſhall the other; but if none, it is directed to them all (*b*). So a re is not to be directed to the coroners but on default of the ff. If the ſheriff die, proceſs does not iſſue until another be, hall not go to the coroners. It is the challenge only makes roners or any of them officers; and why may not the challenge ll make the other ſheriff an officer? In a *quare impedit* againſt rchbiſhop of *York*, if he be found diſturber, the writ *de admit- idoneâ perſonâ* goes to the archbiſhop of *Canterbury*; yet he ot ſuperiority, but only precedency (*c*).

Where there are two ſheriffs, and one is challenged, *the venire* muſt go to the other, and not to the coroner. S. C. Salk. 152. S. C. Carth. 214. S. C. 4. Mod. 65. S. C. Comb. 191. S. C. Holt, 166. S. C. 1. Show. 327. 2. Roll. Abr. 667. Dyer, 367. Stra. 253. Cowp. 112.

d *venire* well awarded.

Skin. 102. 2. Show. 262. 286. Naylor *v.* Sharpley and Others, 1. 198.

(*c*) Dyer, 327. 350. 1. Brown. 159. Fitz. N. B. 38.

* Pitcher *againſt* Tovey. Caſe 49.

ROR OF A JUDGMENT in the court of common pleas in an ction of covenant, wherein the plaintiff declared, that by in- re bearing date the ninth day of *July*, in the year 1680, he ed a houſe in the pariſh of *St. Martin's*, &c. rendering rent, covenant for payment to *R. Gill*, who aſſigned to the defendant;

If a leſſee aſſign the term to a perſon, who aſſigns to *A.* without notice to the leſſor: the leſſor cannot have co- againſt the original leſſee for arrears of rent, after the aſſignment to *A.*—S. C. 4. Mod. 71. . Salk. 81. S. C. 2. Vent. 234. S. C. 3. Lev. 295. S. C. 1. Show. 340. S. C. Carth. 177. Holt, 73. S. C. 1. Freem. 326. 1. Stra. 405. Prec. Chan 156. 1. Bac. Abr. 536. Dougl. 18. 444. 735. 3. Burr. 1271. 3. Term Rep 393.

PITCHER *againſt* TOVEY.

and for rent arrear for three years after aſſignment he brings covenant.

The defendant as to part pleaded *nil debet*, and as to the reſidue *an aſſignment* over before it incurred.

The plaintiff demurred.

And judgment was given by THREE JUDGES in the common pleas for the plaintiff.

AND IT WAS URGED *for the defendant* here, who was plaintiff below, that there was *a privity of eſtate*, though no *privity of contract*, between the aſſignee of a term and the leſſor, after acceptance of him for tenant, which continues, notwithſtanding the aſſignment, until notice of it; as if a tenant make a feoffment, the lord ſhall avow upon him for rent arrear until notice of it (*a*). And ſo it was adjudged (*b*) in the caſe of an aſſignee of a term by two Juſtices; and TWISDEN's reaſon to the contrary is not good, that the leſſor had remedy by diſtreſs; for there is no reaſon that the leſſor, who had two remedies, ſhould be deprived of one of them; for he cannot have debt where the party to whom the term is aſſigned is not known to him; and perhaps his remedy by diſtreſs may fail, where the aſſignment is to a poor man, who is not able to manure the land, or by indigence or otherwiſe ſuffers it to lie freſh, and then the leſſor ſhall be without remedy by diſtreſs, or by action of debt; and ſuch notice ought to be pleaded, as in the caſe of *Marrow v. Turpin*, 3. *Co.* 24. *a.*

But PER CURIAM, *abſente* GREGORY, *Juſtice*, the judgment was reverſed; for debt lies by the leſſor againſt the aſſignee only upon privity of eſtate, and when this fails by the aſſignment over that action is at an end; and it is not like an avowry, which ſhall be made on a perſon certain. That of *Sid.* 339. was haſtily reſolved by two againſt TWISDEN, and the Bar thought it new law. The leſſor is not at ſuch great prejudice as is pretended, for he may diſtrain, or have covenant againſt the leſſee or his executors; and if there be no covenant for payment, he may have debt againſt the ſecond aſſignee, when known; and if that were not ſo, it was his own folly that he accepted the firſt aſſignee for tenant, by which he gave him a liberty of * aſſignment to the other, and diſcharged the leſſee.

* [24]

Judgment was reverſed, and *nil dictum* as to the point of notice (*c*).

(*a*) 3. Co. 23. a.
(*b*) 1. Sid. 339.
(*c*) See Lekeux *v.* Naſh, 2. Stra. 1221. Holford *v.* Hatch, Dougl. 182. 186. Barnfather *v.* Jordan, Dougl. 452. Eaton *v.* Jaques, Dougl. 455. Walker *v.* Reeves, Dougl. 461. Chancellor *v.* Poole, Dougl. 764.

Trial

Trial on the Cuſtom of the Manor of Bray. Caſe 50.

ON EVIDENCE the Court ſaid, that a copy of a court-roll of a manor is good evidence; for wherever the original is evidence, there a copy is. Copy of a probate is good evidence (*a*).

Where original is evidence, copy of it is ſo.

Sir F. L. was refuſed to be a witneſs of a cuſtom, becauſe he claims by it; but any tenant of a manor that claims not by the cuſtom is a good witneſs.

(*a*) See Mr. Nolan's note to the caſe of Rex *v.* The Hoſtmen of Newcaſtle, 1. Stra. 1222.

Anonymous. Caſe 51.

PER CURIAM. Where a *continuando* in treſpaſs is impoſſible, and entire damages, the Court will intend that nothing was given for the *continuando*, becauſe impoſſible.

Entire damages.

Anonymous. Caſe 52.

IN TRESPASS, the declaration was without *vi et armis*. Upon general demurrer, this omiſſion is fatal, for it is ſubſtance, and alters the entry of the judgment, which ought to be with *capias* when the action is *vi et armis*, otherwiſe with a *miſericordia*.

Treſpaſs without *vi et armis* ill.

Buſh *againſt* Cole. Caſe 53.

IN COVENANT, the plaintiff declared, that he leaſed to *A.* a houſe for years, excepting two rooms, with free ingreſs, egreſs, &c. *per le* parlour, hall, &c. and afterwards the leſſee aſſigns to the defendant, and alledges breach, becauſe the defendant had ſtopped the paſſage; and on demurrer, that theſe words do not make a covenant, for they are only the words of the leſſor, and not like 1. *Saund.* 321. where covenant was maintained on the word '*demiſi*:" for there the uſe of a pump was leaſed by him againſt whom the covenant was brought, but here they are the words of him who brings covenant; and if covenant lies, it is not maintainable againſt the aſſignee.

An exception of a paſſage in a leaſe, being not part of the thing demiſed, but *dehors*, amounts to a reſervation, and covenant will lie.

S.C.Carth 232. S. C. 1. Salk. 196. S. C. 1. Show. 388. 1. Lev. 47. 1. Ch. Caſ 294. 2. Mod. 86. Dougl. 765.

But PER CURIAM, Covenant lies againſt the leſſee and aſſignee too; for it is expreſsly laid, that the demiſe was to him and his aſſigns.

*And EYRE, *Juſtice*, ſaid, the diverſity was as taken in *Lord Ruſſell's Caſe*, where the demiſe was of land, except a cloſe; and agreed, that covenant did not lie for diſturbance in this cloſe; but where the exception was of a thing *dehors* to the leſſor, as a way, common, eſtovers, or other profit *aprender*, that is by agreement of the leſſee, the leſſor ſhall have them; and therefore covenant lies. 3. *Cro.* 657. *Mo.* 553.

Burges

Caſe 54. Burges *againſt* Steer.

Common laid for ſheep and found for cows alſo good, for they are diſtinct.

S. C. 1. Show. 347.
S. C. 4. Mod. 89.
S.C. Carth. 419.
Vide Hob. 209.
12. Mod. 300.
Cowp. 766.
Bull. N. P. 59.
1 Burr. 440.

PRESCRIPTION FOR COMMON FOR SHEEP. The jury find, he had common for ſheep *prout* he declared, and *ulterius dicunt* he had common for cows too; and moved, that the verdict did not warrant the preſcription, becauſe entire; and another is found than that on which the plaintiff declared.

But PER CURIAM, The common is ſeveral, diſtinct, and different, for he that preſcribes for ſheep cannot therefore preſcribe for cows.

And HOLT, *Chief Juſtice*, cited *Johnſon and Throughgood's Caſe*, *Brown*, 177, 178. which is the very caſe in point.

Judgment was given for the plaintiff.

TRINITY

TRINITY TERM,

The Fourth of William and Mary,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
} *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Culliford *againſt* Blanckford. Caſe 55.

DEBT FOR FOURPENCE by the plaintiff, a third perſon, againſt the defendant, *Mayor of Dorcheſter*, upon the ſtatute of 23. *Hen.* 6. c. 14. for falſly returning *Sir R. Nap.* to be duly elected member of parliament, whereas *Sir T. T.* s duly choſen.

Suit commenced by *latitat* for a falſe return of a member of parliament is a good commencement of a ſuit. By three Judges, *contra* HOLT, *Chief Juſtice.*

S. C 4. Mod. 129.
S. C. 1. Show. 353.
S. C Comb. 194.
S.C. Carth. 232.
S. C. Holt, 522.

The *poſtea* was ſtayed on two queſtions that aroſe at the trial.

FIRST, Whether the plaintiff was a common informer within ſtatute of 31. *Eliz.* c. 5. and ſo obliged to commence his ſuit hin a year? for the return was made the third of *March*, in the ond year of *William and Mary*, and the *latitat* taken out the 1ſth of *February* the ſame year, but the bill not filed till the third *April*, in the third year of *William and Mary.*

SECONDLY, Whether the ſuit commenced by the taking out of : *latitat?* for if ſo, the action was brought within the year.

EYRE and GREGORY, *Juſtices*, as to the firſt, were of opinion, t the plaintiff was no common informer within 31. *Eliz.* c. 5. auſe by 23. *Hen.* 6. the penalty is wholly given to the party ieved, or, in his default, to him that will ſue for it; and 31. *Eliz.* c. 2.

CULLIFORD *againſt* BLANCKFORD.

c. 2. extends only where it is given to the king, or to the king and informer; but where it is given to the party only it is *caſus omiſſus*, and remains as at common law; and ſo is *Noy*, 71. in the caſe of the party grieved, and the action be brought *tam quam*, yet it is only to have a *capiat*; and if the party had died, the king could not proceed, as he may do when the penalty is given to both.

DOLBEN, *Juſtice*, *dubit.*

HOLT, *Chief Juſtice*, was of opinion, that he was a common informer within the ſtatute; for this is a popular action, and the penalty to him that will ſue.

* [27]

1. Vent. 28. 3. Burr. 1241. 1423. 2. Bl. Rep. 312. Dougl. 315.

* As to the ſecond, EYRE, GREGORY, and DOLBEN, *Juſtices*, The *latitat* being taken out within the year, the ſuit was ſufficiently commenced; and they compared it to the caſe, where the ſtatute of Limitations is pleaded, the plaintiff may reply, that he purchaſed a *latitat* within the time, *eâ intentione* to declare in the action, 1. *Sid.* 53.; and this ſhall ſave his being barred.

HOLT, *Chief Juſtice*, agreed that caſe, becauſe it was to ſave an old right of action veſted, but he knew never an inſtance where ſuing out a *latitat* did ſave a limitation of an action of debt upon a penal ſtatute; but the time of commencement ought to be reckoned from filing the bill. Beſides, there was no need of ſuing by bill for ſuch penalty, but it might have been by original.

But, notwithſtanding, judgment was given for the plaintiff by the other three. *Hall and Wymark's Caſe* (*a*).

(*a*) See S. C. 4. Mod. 130, *nota.*

Caſe 56. The King and Queen *againſt* Prat.

The maſter of an apprentice in huſbandry dies, the juſtices at the ſeſſions order his executors to keep him, quaſhed; and ſaid, perhaps covenant might lie againſt the executors.

A MAN took an apprentice in huſbandry according to 5. *Eliz.* c. 2. who died before the time of ſervice was expired; and the apprentice being impotent and a cripple, the juſtice of peace, by order of ſeſſions, ſent him to the executor, and ordered him to keep him.

And it was quaſhed, becauſe the inconvenience would be great if the executor ſhould be forced to obey it; for perhaps he has not aſſets; and it cannot be tried whether he has or not upon a proceeding at ſeſſions (*a*). Beſides, the executor may be in another county, and then cannot be charged with this order.

S. C. Salk. 66. S. C. 1. Show. 405. Comb. 224.

And *per* EYRE, *Juſtice*, An apprenticeſhip is a perſonal truſt between maſter and ſervant (*b*), and is determined by the death of either (*c*), becauſe the end and deſign of it cannot be obtained; for the executor may not underſtand the trade in which he is to be inſtructed. Perhaps an action of covenant may lie againſt the exe-

(*a*) Rex v. Parnes, 1. Stra. 48.

(*b*) Baxter v. Benfield, Conſt's P. L. vol. i. 513. Rex v. Eakring, Burr. S. C. 320.

(*c*) See now 32. *Geo.* 3. c. 57. §

cutor

ıtor upon the contract of the teſtator; but there he may make his defence by pleading "no aſſets;" and therefore this caſe differs from 1. *Sid.* 216.

THE KING AND QUEEN *againſt* PRAT.

* [28]

The King *againſt* Glide.

Caſe 57.

Alderman removed for abſenting himſelf from the city, and not attending, *licèt ſummonitus*; held well by three Judges, *contra* HOLT, *Chief Juſtice*, who held a particular ſummons was neceſſary. S. C. poſt. 251. S. C. 1. Show. 364. S.C.Comb. 197. S. C. Holt, 169. 435. S.C. 1. Ld. Ray. 223. Dougl. 149. Cowp. 503.

MANDAMUS to reſtore *Glide* to his place of alderman of *Exon*. They return, that *Exon* is an antient city, and that time, &c. there has been a court held, * conſiſting of eight aldermen and ten others, who were the chamber and common-council of the ſaid city, who uſed to meet on due ſummons for the better government of the corporation; and that for miſdemeanors in the aldermen this court uſed to amove them; that *Glide* was choſen an alderman, and by virtue of that office was a juſtice of peace in the ſaid city, but that he removed himſelf and his family from the ſaid city to *Topſham, et præd. civitatem deſeruit et reliquit*; by which he neglected the duty of his office, and came not to ſeveral councils there held, and declared he would never come more; and for theſe reaſons, at a court held, of which he had notice, and *licèt ſummonitus fuit* he did not appear, they diſfranchiſed him.

EYRE, *Juſtice*. No peremptory *mandamus* ſhall go, becauſe he being an alderman, and having removed his habitation from the city, has given good cauſe of diſfranchiſement; for it is incident to the place and duty of an alderman to aſſiſt in the government of the city, and to be reſident there to that purpoſe. Beſides, an alderman's place is not a place of profit, but all the advantage of it conſiſts in freedom, precedence, and authority; and if he remove himſelf from thence, he is incapable of enjoying theſe privileges. *Et quòd deſeruit et reliquit* is a ſufficient return; although it do not appear but he might have returned again, this could not purge his offence and forfeiture, but he continued ſtill removeable for it: as if tenant for life make a feoffment in fee on condition, and enter for condition broken before the leſſor takes advantage of the forfeiture, yet this does not purge it. But as to his ſaying he would return no more, this would not help the return, becauſe no obſtacle to his coming again; but he muſt have been ſummoned before they diſfranchiſed him; but being removed thence, no ſummons is neceſſary.

GREGORY, *Juſtice, accord. in omnibus*; adding, that if *Glide* had declared his reſolution of not coming again to the mayor, it would be a diſfranchiſement.

DOLBEN, *Juſtice*. The cauſe of diſfranchiſement had been good if well returned; but he ſaid, *quòd deſeruit et reliquit* generally was not good, without any allegation that he never returned again; for if he returned before the diſfranchiſement, it would be a ſufficient cauſe to prevent it; but it being returned, that he came not to court according to ſummons, this makes the return full.

* HOLT, *Chief Juſtice*. I agree that his abſence, &c. was a good cauſe to diſfranchiſe him; but here is no ſufficient ſummons returned,

* [29]

Vide 1. Sid. 14.

The King against Glide.

turned, for he ought to be ſummoned to anſwer his faults before diſfranchiſement (*a*). It is true, it is alledged that *licèt ſummonitus* he did not attend; but a general ſummons will not avail, for they cannot, when they have him in court, object and deprive him for any miſdemeanor, but the ſummons to this purpoſe ought to be particular, to anſwer to ſuch and ſuch faults. But if it appear, that he was not an inhabitant within the city at the time of the court held, there is no need of averring a ſummons; yet though he left his habitation, yet poſſibly his return might cure his default before; and if he does return, and they did not ſummon him, he could not be deprived; for perhaps he could have alledged ſome good cauſe for his departure, as ſickneſs, which might have ſatisfied the court; for the difference is, where they might have an opportunity of ſummoning him, and where not; and this being a return ought to be certain to every particular, becauſe the party has no anſwer to it; but it might have been good in an action on the caſe, where he might have replied to it. 3. *Bulſt.* 189. 1. *Roll.* 409. It was returned to a *mandamus*, that thirty of the common-council, in the council-chamber aſſembled, removed the plaintiff; and this was ruled to be ill, becauſe it was not alledged, that the common-council was held for this purpoſe; for the common-council might have come to a feaſt, and not as a court. So in this caſe, though *Glide* left the place, yet there being a poſſibility of returning again before disfranchiſement, and upon ſuch a return a ſummons being neceſſary before he could be removed, and it not appearing on the record that he did not return, the disfranchiſement muſt be taken to be naught.

Vide poſtea, Hil. 7. *Will.* 3. Fletcher *v.* Ingram.

But on the opinion of the other three, no *peremptory mandamus* was granted (*b*).

(*a*) See Rex *v.* Heaven, 2. Term Rep. 772.

(*b*) Rex *v.* Chalke, 1. Ld. Ray. 225. Salk. 428. 5. Mod. 254. 257. Rex *v.* Lyme Regis, Dougl. 149. 160.

MICHAELMAS TERM,

The Fourth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Williams *againſt* Saliſbury. Caſe 58.

THE want of *cur. hic prolat.* helped after verdict by the ſtatute of *Oxford, profert hic in cur. literas adminiſtratorias.* Form after verdict, but ſubſtance on demurrer (*a*). *Hic prolat.* helped by verdict.

(*a*) See Hobart, 233. and the caſe of Morley v. Vivian, poſt. 38.

Anonymous. Caſe 59.

SPECIAL BAIL but diſcretionary in covenant.

Anonymous. Caſe 60.

HOLT, *Chief Juſtice.* If a plaintiff bring error of judgment for the defendant, it is reviving the firſt action; and then it is proper for the Court to give ſuch a judgment as he ſhould have had below: but if the defendant bring writ of error, it is only to be diſcharged. Judgment in error.

Caſe 61.

The King *againſt* Hicks.

Information for uſing a trade, not being ſeven years apprentice thereto, muſt be brought in the proper county.

S. C. 1. Salk. 373.
S. C. 4. Mod. 158.
S. C. 3. Salk. 350.

INFORMATION on 5. *Eliz.* c. 4. for not being an apprentice for ſeven years, brought in the court of king's bench, though the trade was uſed in *Yorkſhire*.

PER CURIAM. It does not lie; though it was objected, that it was not brought by a common informer; and where debt was brought upon a penal ſtatute, HALE held it maintainable (*a*); for the ſtatute of 21. *Jac.* 1. c. 4. not only enacts, "that all offences "againſt a penal ſtatute, for which an informer may ground any "actions, bills, &c. before juſtices of aſſiſe, &c. ſhall be ſued before "juſtices of aſſiſe, &c. of the county where ſuch offences * are "committed;" but alſo, "that all informations, &c. ſued at "*Weſtminſter* for ſuch offences ſhall be void."

* [31]

Poſtea, Mich. 10. *Will* 3. Clayton *v.* Kynaſton, 3. Lev. 71. *contra*.

DOLBEN, *Juſtice*. It was adjudged by HALE, that debt did not lie, though it was doubted by him.

HOLT, *Chief Juſtice*. It was adjudged in the exchequer-chamber, that debt did not lie in *Weſtminſter-Hall*, upon a penal ſtatute for an offence in another county, in a caſe where he was of Counſel (*b*).

(*a*) In the caſe of Barnes *v.* Hughes, 3. Vent. 8.

(*b*) See Shipman *v.* Henbeſt, 4. Term Rep. 109.

Caſe 62.

The King and Queen *againſt* Portington.

Superſtitious uſes void; and though by 1. *Edw.* 6. given to the king, that does not extend to future ones.

EJECTMENT upon a ſuperſtitious uſe.—HOLT, *Chief Juſtice*. The ſtatute of 23. *Hen.* 8. c. 10. makes ſuperſtitious uſes void, but does not give them to the king (*a*). The 1. *Edw.* 6. c. gives to the king, but does not extend to future uſes ſince. Wherefore it would be convenient for the heir to ſeek remedy in parliament, according to *Mo.* 784.

S. C. 1. Eq. Abr. 96. S. C. 1. Salk. 162. S. C. 3. Salk. 334.

(*a*) See Amb. 228. and the ſtatute 9. *Geo.* 2. c. 36.

Caſe 63.

Ball *againſt* Briggs.

Eſcape. Vide 3. Co.

DEBT UPON AN ESCAPE. The defendant pleads freſh purſuit and re-taking of the party the ſame day the bill was filed; and adjudged no plea, the action being once attached in the plaintiff. 1. *Jo.* 145.

HILARY

HILARY TERM,

The Fourth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

* Symonds *againſt* Cudmore. Caſe 64.

If a tenant in tail, remainder to himſelf in fee, make a leaſe for years to commence *in future*, and die before the commencement of the term, and the iſſue levies a fine, the leaſe is good againſt the conuſee.

TENANT IN TAIL of a reverſion expectant upon a leaſe for years, with the reverſion in fee to the ſame tenant in tail, makes a future leaſe, and dies; the iſſue, before the commencement of the future leaſe, levies a fine.

The queſtion was, Whether the conuſee ſhould avoid the leaſe?

EYRE, *Juſtice.* He ſhall not: The leaſe is not void, but voidable: it takes hold of the eſtate-tail, and charges it after the determination of the firſt leaſe, and by poſſibility might have begun during the tenant in tail's life; though it would have been void if made to commence after his death; becauſe it ſhould not have ſucceed out of the tenant in tail's eſtate, but the iſſue's: but now as it ſtands, it is only voidable *(a)*.

But ſuppoſing the leaſe to be void as to the iſſue, yet neither he nor the conuſee can avoid it; not the iſſue, becauſe barred by fine; nor the conuſee, for the leaſe iſſues out of both the eſtates which paſſed to him by the fine *(b)*. Where the king, tenant in tail, with reverſion expectant, grants the land in tail, if it were the caſe of a common perſon, held it ſhould operate on both eſtates (*c*). The rent iſſues out of all the eſtate, according to the rule in 5. *Co.* 17. *b.* and rather than the leaſe ſhould be void, it ſhall iſſue both out of the

S. C. 4. Mod. 1. S.C. 1. Salk. 338. S. C. 1. Show. 370. S. C. Skin. 284. 317. 328. S.C. 3. Salk. 335. S.C. Carth. 257. S. C. Holt, 666. S. C. 1. Freem. 503. Cruiſe on Fines, 60. Bridg. 27. 1. Roll Abr. 843. 2. Atk. 204. 3. Bac. Abr. 324. 4. Brown's P. C. 594. Cowp. 379.

(*a*) Co. Lit. 46. Cro. Eliz. 718. (*c*) 1. Cro. 103. Hutt. 96.
(*b*) 1. Co. 47.

SYMONDS *againſt* CUDMORE.

* reverſion in tail and remainder in fee; now the tail is extinguiſhed, and the conuſee is ſeiſed of a fee only, and ſo the leaſe unavoidable, as derived out of it. And that the fine conſolidates both eſtates, and utterly extinguiſhes the tail, as to iſſue, is proved, 2. *Lea.* 37. 3. *Co.* 51. *b.* 1. *Cro.* 478. *Hob.* 258. 323.

And ALL THE WHOLE COURT held with him in the ſecond point.

HOLT, *Chief Juſtice*, and GREGORY, *Juſtice*. The leaſe is not void, not on tenant in tail's death, for if it were, no after-act could make it good, 1. *Roll.* 260.; but it may be made good. So is *Bridgman*, 28. *Dyer*, 46. 2. *Bulſt.* 44. And therefore the iſſue has election to avoid it by entry, or make it good by acceptance of rent; and the iſſue, if he had ſtayed till the leaſe was out, might have avoided it; but the conuſee ſhall not have that privilege, becauſe none but privies in blood ſhall avoid ſuch leaſe.

DOLBEN, *Juſtice*, accorded *in omnibus*; and ſaid, *Siderfin* was miſtaken in the report of *Oyus and Thomaſius's Caſe*, as to time and true ſtating.

HOLT, *Chief Juſtice*, agreed to the judgment, but differed in ſome things; and ſaid, if the leſſor and conuſor had been ſeiſed of a reverſion only, he ſhould have been of opinion for the plaintiff, that the leaſe was void; for if a tenant in tail make a leaſe at a day future, and dies before commencement, it is void at the election of iſſue. FIRST, Becauſe the future intereſt is no eſtate until actual entry, and until then tenant in tail is ſeiſed, for before ſuch leſſee has only a right (*a*). And entry being neceſſary to a title, it is defeated by the tenant in tail's death; and if the leſſee afterwards enter, the heir may have treſpaſs againſt him (*b*). It is held to be a void leaſe, not becauſe it iſſues out of the eſtate of the iſſue only, for it charges the whole tail; but the true reaſon is, becauſe the leſſee has no title to enter until poſſeſſion devolved to the iſſue, who has a precedent and paramount right; and be there a poſſibility of commencing during the tenant in tail's life, who is leſſor, and it does not commence, or be it limited to commence after his death, the leaſe is void to charge the poſſeſſion of the iſſue. SECONDLY, Where tenant in tail makes a future leaſe, there is no act appointed by law by which the iſſue can avoid it until after the tenant in tail's death; and after his death, he can neither enter nor make claim, or bring action, which are the only ways of defeating an eſtate; yet there is none of them neceſſary to prevent ſuch veſting. Therefore the *intereſſe termini* is void as to the poſſeſſion of the iſſue, who has power to avoid it. And he compared it to the caſe in 4. *Co.* 53. 1. *Inſt.* 218. feoffment in fee, on * condition to pay a ſum of money at a day certain; afterwards the feoffee makes a leaſe of the land to the feoffor, and does not perform the condition, the fee ſhall be adjudged immediately in the feoffor; for he could not enter, and need make no claim, becauſe in poſſeſſion; and there would be a circuity if the law were

Vide tamen 1. Inſt. 185. a. 186. b.

* [34]

(*a*) Co. Lit. 201. Litt. ſect. 58. 459. (*b*) Dyer, 279.

otherwiſe,

viſe, for the iſſue muſt permit the leſſee to enter, and then ouſt and beſides, this leaſe was made by a tenant of a reverſion: ſuppoſe he had granted over a reverſion and died, the grant have been void until the iſſue had done ſome act to confirm . And if it ſhall be ſo in the caſe of a grant of inheritance, *iori* in the caſe of a leaſe. SYMONDS *againſt* CUDMORE,

ow the fine levied does not corroborate the leſſee's eſtate, nor is any election in the iſſue. Firſt, Becauſe the time of his elec- was not come, which was not to have been until after the com- ement of the leaſe. Secondly, When a thing or eſtate is or at the election of any perſon, the levying of a fine ſhall not guiſh the election, but only convey the eſtate *(b)*. And there ifference between a power to make a leaſe good, and an election ake it good or void; but when the conuſee has, by acceptance treſs, affirmed the leaſe, he ſhall be concluded to ſay the conuſor iſſue in tail; which was firſt held *Plowd.* 437. And in er age, COKE was of the ſame opinion (*c*). But there being ch act in this caſe, if this had been the point only, judgment t to have been for the plaintiff.

Litt. f. 608. 3. Co. 84, 85. (*c*) Co. Lit. 47. 1. Roll. Abr. 190. 1. Cro. 302.

Bondler *againſt* Orabb. Caſe 65.

MISTAKE of a clerk through careleſſneſs in an inferior court is amendable, but not if through want of ſkill. Amendment.

Can *againſt* Cary. Caſe 66.

HERE an agreement is at land, and a performance is at ſea, it ſhall be tried where the agreement is made: and ſaying *tibus tranſmarinis infra paroch.* is idle. Raym. 3.

EASTER TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Caſe 67.

* Anonymous.

In what caſe *title* muſt be ſet forth.

HOLT, *Chief Juſtice.* Where *a common* or *a way* claimed, the title ought to be ſet forth in the declaratio but for *a fair* or *a franchiſe*, which is no charge to a ther's ſoil, there *habere debuiſſet* is good, without further.

Yelv. 147 Poph. 1. Salk. 335. 4. Mod. 424. 1. Stra. 5. Comy. Rep. 7. 5. Com. Dig. "Pleader" (C. 3

Caſe 68.

Anonymous.

Oyer muſt be craved of an original. Tidd Prac. 343.

HOLT, *Chief Juſtice.* One cannot take advantage of an ginal, though never ſo vicious in recital, without craving of it.

Caſe 69.

Hicks *againſt* Harris.

Suit in the ſpiritual court to annul an inceſtuous marriage, pendir.g which one of the parties dies, prohibition ſhall go as to annulling the marriage.— 2. Salk. 548. S. C. 4. Mod. 182. S. C. Carth. 271. S. C. Comb. 200. T. Jones, 213. S 20. 2. Vez. 245.

MOTION againſt a rule for a prohibition granted on a ſente in the ſpiritual court about an inceſtuous marriage, to dec it null and void after the death of one of the parties *(a)*.

(*a*) *Harris*, after the death of his wife without iſſue, married her ſiſter, by whom he had ſeveral children. He was libelled in the ſpiritual court for this inceſtuous marriage, and pending the ſuit his wife died; but, notwithſtanding this e the Court proceeded in the ſuit, an clared the marriage to be void.— 4. Mod. 182.

hief Juſtice. The reaſon of the ſentence is to prevent in inceſt, and there is no occaſion for it here. Then ight have diſproved the evidence, if alive. They cannot nce to baſtardize the iſſue, that is only by conſequence; incroach on common law, though they have original we will prohibit.

HIGGS *againſt* HARRIS.

prohibition *quoad* to declare the marriage void was

La Baſtile *againſt* Reignald and his Wife. Caſe 70.

ine replegiando, on the iſſuing of THE WRIT the de- entered an appearance before the return of the writ with . The ſheriff returned *elongavit*; upon which a was awarded.

In a *homine replegiando*, where the party appears on the day proceſs is returnable and pleads *non cepit*, there is no need of bail, and a *ſuperſedeas* ſhall go to the *withernam*.

S.C.Carth. 286. S.C.Comb. 200. 4. Mod. 183. Skin. 337. Co. Lit. 135. Poſtea, Mich. 12. *Will.* 3. More *v.* Watts.

deas was moved for, becauſe appearance was entered, to plead *non ceperunt*.

ſaid, wherever an *elongavit* is returned, and the defend- appear and plead *non ceperunt*, it ſhall ſtay the *wither-* ſe the end of the writ is only to bring in the defendants id plead.

the other ſide agreed to; and only prayed, that the de- ght *gage deliverance* before it was granted.

hief Juſtice. There is no difference between a *replevin e replegiando*; for as the ſheriff can return nothing but *t*, where he cannot find the thing to be replevied in one ther can he in the other. And as to *gaging deliverance*, t was to be done by the plaintiff only where the thing is

ien moved, that the defendant ſhould find bail.

LT, *Chief Juſtice*, Where the party appears on the day turnable, and pleads *non cepit*, there is no need of bail.

re, PER CURIAM, a *ſuperſedeas* to the *withernam* was hout bail.

Hodges *againſt* Steward. Caſe 71.

pon a bill of exchange. The plaintiff declared on the of *London*, that where one merchant draws a bill on yable to another or bearer, and the perſon to whom it is orſes it to a third man, the indorſee, on refuſal of pay- bring an action againſt the drawer; and ſays, the de- w ſuch a bill to *F.* who aſſigned it to the plaintiff, *unde*

A bill of exchange payable "to *A.* or "bearer" is not aſſignable

S C. 1. Salk. 125. S. C. 3. Salk. 68.

6. S. C. Comb. 204. 1. Ld. Ray. 181. Poſtea, Paſch. 12. *Will.* 3. Carter *v.*

HODGES' *againſt* STEWARD.

PER CURIAM. There is a difference between a bill payable "to *J. S.* or bearer" and a bill "to *J. S.* or order *(a)*;" and one is not aſſignable by the contract, the other is: there is no authority given to aſſign by the one, by the other there is *(b)*.

SECONDLY, This is a good bill between the indorſer and the indorſee, for the indorſement is in nature of a new bill.

THIRDLY, Though there is no averment of the defendant's being a merchant at the time of drawing the bill, yet the drawing the bill was a * ſufficient trading and negotiation to this purpoſe.

* [37]

And HOLT, *Chief Juſtice*, cited the caſe of *Sarſefield v. Witherley* (*c*): Action againſt *Witherley* upon a bill of exchange; he pleaded that he was not a trader, but a gentleman ſent into *France* to travel, and for conveniency of a return drew this bill, &c.; and judgment was given for the defendant in the king's bench; but it was reverſed in the exchequer chamber, becauſe his drawing a bill made him a *trader* within the cuſtom of merchants as to a bill of exchange.

FOURTHLY, The plaintiff having declared on a ſpecial cuſtom, for a bearer to have an action, and the defendant having demurred inſtead of traverſing it, though in truth there be no ſuch cuſtom, has confeſſed it.

And ſo judgment was given for the plaintiff. For though the Court ſhall take notice of the law of merchants, and if an action had been brought upon it, that demurrer would not have concluded the Court to give judgment for the plaintiff, or forced them to determine a thing otherwiſe than the law directs, yet they cannot take notice of cuſtoms of particular places (*d*); and the cuſtom in the declaration being ſufficient to maintain an action, the defendant by confeſſing it by demurrer has given judgment againſt himſelf.

Indebitatus aſſumpſit will not lie on a bill of exchange.

Hard. 486, 487. 1. Vent. 152. 1. Mod. 285. 5. Term Rep. 483.

FIFTHLY, A general *indebitatus aſſumpſit* will not lie upon a bill of exchange for want of conſideration; but a bill is but evidence of a promiſe, and ſo but *nudum pactum*; and therefore he ought to bring a ſpecial action upon the caſe, upon the bill and cuſtom of merchants, or elſe a general *indebitatus aſſumpſit* for money received to his uſe (*e*).

(*a*) See Nicholſon v. Sedgwick, 1. Ld. Ray. 180.

(*b*) Both bills of exchange and promiſſory notes payable to bearer are negotiable. See 3. & 4. Anne. c. 9. Hinton's Caſe, 2. Show. 23. Grant v. Vaughan, 3. Burr. 1516. Miller v. Race, 1. Burr. 452. Minet v. Gibſon, 3. Term Rep. 481. 1. H. Bl. Rep. 569. Kyd on Bills, 19. 35.

(*c*) 1. Show. 125. Comb. 45. 152.

(*d*) 1. Wilſ. 9. Stra. 1187.

(*e*) See 1. Burr. 373. and Kyd on Bills, 114.

Davy and Nichols *againſt* Smith.

Caſe 72.

If a teſtator might ſee the witneſſes ſubſcribe, it is a ſubſcription in his preſence.—S. C. 3. Salk. 395.

AT A TRIAL upon a feigned iſſue in *aſſiſe*, directed by THE HOUSE OF LORDS, concerning a will made of lands by *J. S.*

The

DAVY AND NICHOLS *againſt* SMITH.

ion was, Whether the witneſſes to the will had purſued of the ſtatute 29. *Car.* 2. c. 3. of Frauds and Perjuries, g their names?

CURIAM, If the teſtator lay in a bed in one room, eſſes went through a ſmall paſſage into another room, their hands at a table in the middle of the room, and e door, and both doors open, ſo that the teſtator might, ſee them, though no proof he did ſee, it is ſufficient ıtute; and therefore he ſaid, if witneſſes ſubſcribe in n where a teſtator lies, but the curtains of the bed iis is a good ſubſcription; and becauſe it is in the teſtator to ſee, it ſhall be conſtrued to be in his pre-

r. 2. c. 3. "All deviſes f any lands or tenements ting, and ſigned by the ing the ſame, or by ſome i his preſence and by his on, and ſha'l be atteſted *in the preſence* of the ſaid ee or more credible wit- The words *in the pre-* held as ſynonymous to Sheers *v.* Glaſſcock, Salk. 688. Carth. 81. Eq. Caſ. Abr. 403. Eccleſton *v.* Petty, 1. Show. 89. Broderick *v.* Broderick, 1. Peer. Wms. 239. Machel *v.* Temple, 2. Show. 288. Longford *v.* Eyre, 1. Peer. Wms. 740. Right *v.* Price, Dougl. 242. Capon *v.* Dade, 1. Brown's C. C. 99. Dormer *v.* Thurland, 2. Peer. Wms. 509. Stonehouſe *v.* Evelyn, 3. Peer. Wms. 254. Gryle *v.* Gryle, 2. Atk. 176. Carleton *v.* Griffin, 1. Burr. 549.

Opy *againſt* Adiſon and Others.

Caſe 73.

Mariners wages ſuable in the admiralty court if by parol; *aliter* if by agreement under ſeal.

S. C. 1. Salk. 31.

Vide poſtea, Trin. 12. *Will* 3. Clay *v.* Snelgrave.

Conſet on Courts, 422. 2. Wilſ 264. 2. Stra. 968. 3. Term Rep. 267.

N to diſcharge a rule for prohibition to THE COURT OF ALTY, in a ſuit for *mariners wages*, upon ſuggeſtion in writing made for them at land.

ecauſe they have a juriſdiction.

CURIAM, It is allowed, and nothing but conſtant ns it; but if there be a ſpecial agreement that mariners wages in any other manner than uſual, or if the under ſeal, in both theſe caſes prohibition ſhall go (*a*); is in writing only, it is but a parol agreement, and have power, as here.

Y, They ſaid, there was no libel, then there could be 1.

URIAM, If there be a citation, and the ſhip arreſted, mal libel, it is ſufficient (*b*).

firſt matter the rule was diſcharged.

v. Napier, 4. Burr. Searle, 2. Stra. 968. Ld. Ray. 1209. Mene- 3. Term Rep. 267. ſaid to be otherwiſe, by

the Court, upon a motion made by MONTAGUE, in the caſe of *Barr v. Barr*, in the king's bench, in *Michaelmas Term*, in the fourth year of *Queen Anne*.—NOTE *to the former edition.*

Caſe 74.

Morley *againſt* Vivian.

Vide ante, page 30.

ET HOC PARATUS EST VERIFICARE held to be only form; and though it has been held ſubſtance, yet ſubſequent opinions have been contrary.

Caſe 75.

Davis *againſt* Speed.

Huſband ſeiſed in right of his wife covenants with her to levy a fine to the uſe of the heirs of his body on her begotten; the limitation is void.
S. C. Holt, 730.
S. C. 4. Mod. 153.
S. C. Salk. 675.
S. C. Skin. 351.
S. C. Carth. 262.
S. C. Show. Parl. Ca. 104.
Fearne, 409. (210).
4. Com. Dig. "Eſtates" (B. 24).
6. Com. Dig. "Uſes" (B. 2.). (K. 7.).

EJECTMENT. Huſband and wife, ſeiſed in fee in right of the wife, levied a fine to *J. S.* and his heirs, to the uſe of the heirs of the body of the huſband, begotten of the wife, and for want of ſuch iſſue, to the right heirs of the huſband: the wife dies; the huſband dies without iſſue.

The queſtion was, Who ſhould have the land, the leſſor of the plaintiff as heir to the huſband, or the defendant as heir to the wife?

DARNELL *for the plaintiff.* A particular eſtate ariſes to the huſband by implication, though this be not a covenant to ſtand ſeiſed, like *Pibus and Mitford's Caſe, Mod. Rep.* 122. 159. where the eſtate for life aroſe out of the old eſtate of the covenantor new-moulded; and to the purpoſe, 1. *Roll.* 240. 1. *Inſt.* 22. *b.* that an eſtate ſhould be raiſed to the huſband by implication; but thoſe caſes are of conveyances made by him who had the eſtate before; but * in this caſe, the huſband had no eſtate before, but all was in the wife; but notwithſtanding he ſaid, that the huſband having power to declare the uſes of the fine, and perhaps having iſſue at that time, and by that intitled to be tenant by the curteſy, he might not think it neceſſary to make a limitation to himſelf. But ſuppoſing he ſhall have no uſe by implication, yet he ſhall have a remainder as a ſpringing uſe; and there is no need of a freehold to ſupport ſuch remainder. 1. *Lev.* 101. *Mo.* 720. But the feoffees have a *ſcintilla juris* to execute it when it comes.

* [39]

NORTHEY *contra.* There is no alteration made by the fine, but the wife is in of her old eſtate, there being no perſon to take a freehold in poſſeſſion. Such an eſtate might not be good at common law; but ſince the ſtatute of 27. *Hen.* 8. c 10 uſes muſt be ſubject to common law, and no fractions can be made in an eſtate ſettled to uſe. 3. *Cro.* 334. 2. *Raſtal*, 797. 1. *Cro.* 321. And the caſe in the *Modern Reports* is not like this; for that was a covenant to ſtand ſeiſed, and this is by tranſmutation of poſſeſſion; and there is no eſtate left in the feoffee or conuſee, but only a poſſibility to ſerve future uſes. 1. *Co.* 157. The notion of a ſpringing uſe has been ſet up to ſet a fee upon a fee; but it was never known that the firſt uſe was a ſpringing uſe.

HOLT, *Chief Juſtice.* The firſt uſe may be a ſpringing uſe; for if I bargain and ſell to the uſe of another five years hence, this is a good future uſe; there is a difference between a covenant to ſtand ſeiſed and a feoffment to uſe; for until the contingency happens,

ens, or the time comes for the future uſe's riſing, it ſhall :n again to the feoffor. A feoffment to the uſe of the right : of *J. S.* after the death of *J. S.* is a future uſe; but if it : limited to riſe after the death of one without iſſue, this is void, out a particular eſtate to ſupport it. So is *Pell and Brown's* , unleſs the dying without iſſue be within a certain term, as in the life of a man; for otherwiſe the law will not ex- the veſting of it, but will conſtrue the limitation to be , becauſe the poſſibility is foreign: *Holcroft's Caſe* in *Moor* :preſs.

Davis *againſt* Speed. Poſtea, Paſch. 6. *Will. & Mary.* Goodright v. Cornish. Poſtea, Paſch. 11. *Will.* 3. Scattergood v. Edges.

ıdgment *for the defendant (a).*

A writ of error in parliament was brought, and the judgment affirmed. Show. 104.

The King *againſt* Knowles.

Caſe 76.

DICTMENT againſt *Ch. Knowles, Eſq.* for murder. Miſ- ıomer pleaded, and prays to amend ſomething in the plea.

S. C. poſt. 55. S.C. 1. Salk. 47. S. C. 2. Salk. 509. S. C. 3. Salk. 242. S.C. Comb. 273. S.C. Carth. 279. S. C. Skin. 336. 517.

[OLT, *Chief Juſtice.* You cannot amend, for it is in parchment, ſo a record; but when in paper, it is only a warrant to make a rd by.

YRE and DOLBEN, *Juſtices.* No difference between being archment and paper; and therefore amended.

S. C. Trem. 11. S. C. 1. Ld. Ray. 10. S. C. 8. St. Tr. 50. 58. Ante, page 20.

* [40]

* Anonymous.

Caſe 77.

RESCRIPTION for a pew in a church by reaſon of his houſe; affidavits made "that he was no inhabitant there, nor is n inhabitant," are not ſufficient; for poſſeſſion only is enough, hout living there (*a*).

Preſcription for a pew. 3. Lev. 73. 1. Burr. 440.

) But ſee Stocks v. Booth, 1. Term Rep. 431, *notis.* Griffith v. Mathews, . 428. Rogers v. Brooks, 1. Term 5. Term Rep. 297.

Anonymous.

Caſe 78.

' one employ another to manage buſineſs for him, though no ſworn attorney, the party himſelf cannot take advantage of it.

Anonymous.

Caſe 79.

[OLT, *Chief Juſtice.* There ought to be no plea to the juriſ- diction of the Court after imparlance, but the practice has en only to make it a *reſpondeas ouſter.* A ſpecial imparlance ıits the juriſdiction of the Court, though it has been otherwiſe ld.

No plea to the juriſdiction after imparlance. Raym. 34.

Anonymous.

Caſe 80. Anonymous.

Prohibition to the ſpiritual court *quoad* anſwering on oath in a ſuit for adultery.

MOTION for a prohibition to the eccleſiaſtical court in caſe of adultery, becauſe they obliged the party to anſwer on oath.

And prohibition was granted *quoad* that, that he ſhould not anſwer on oath, but proceed as to the reſt.

THEN IT WAS MOVED, that there was a temporary penalty for providing for baſtard children.

But CURIA—We will not grant it, becauſe the eccleſiaſtical court proceeds only to the puniſhment of the crime of adultery.

Caſe 81. Anonymous.

Practice. Tidd's Pract. 313. 631. 692.

AFTER RULE entered, judgment ſhall be ſigned on the eighth day after incluſively in *Hilary* and *Trinity Terms*.

Caſe 82. Anonymous.

Witneſſes. Kely. 17. 3. Keb. 136. 2. Sid. 237.

WHERE ſeveral defendants are in an information, and ſome of them have not pleaded, the attorney-general may enter a *nonpros* as to them, and they are good witneſſes. Stiles, 401. Saville, 34. 4. Hawk. P. C. 7th edit. ch. 46. ſect.

Caſe 83. Anonymous.

Rules for ſigning judgment. See Tidd. Prac. 601.

IF THE PLAINTIFF give rules for ſigning judgment, and rules are out, and no judgment ſigned before the eſſoin-day of next Term, the plaintiff muſt give new rules.

TRINITY

TRINITY TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
} *Juſtices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Wharton *againſt* Liſle.

Caſe 84.

TROVER AND CONVERSION of ſeveral loads of flax. On *not guilty* pleaded, the jury found the plaintiff impropriator of a rectory, and the defendant vicar of the ſame; and that about eight years ſince flax was firſt ſown within the pariſh; for the firſt year the parſon had tithes of it, for the laſt ſeven the vicar had conſtantly taken them. They find, that there were *ſix hundred and ſixty acres* ſown with corn, and *twenty-ſix* only with flax; that the vicar was endowed with ſmall tithes.

Tithes of *flax* are ſmall tithes, wherever ſown.

S. C. 3. Lev. 365.
S. C. 4. Mod. 183.
S.C.Comb.201, 209.
S.C. Carth. 263.
S. C. Skin. 341, 356.
S. C. 3. Salk. 349.
1. Roll. Abr. 633.
Cro. Eliz. 467.
Cro. Car. 28.
Hutton, 73.
Wood's Inſt. 162.
3. Com. Dig. "Diſmes" (G. 2.).

The queſtion was, Whether flax were great or ſmall tithe?

HOLT, *Chief Juſtice.* The beſt way to diſtinguiſh tithes is the place where they grow and are ſown; for ſown in a garden, they are ſmall tithes; if ſown in a field, great; and this rule extends to corn, hops, &c.

But EYRE, DOLBEN, and GREGORY, *Juſtices*, The place is not material, but we ſhould only conſider the nature of the thing; if corn be ſown in a garden, the parſon ſhall have it; if flax in a field, the vicar; but if the greater part of the pariſh be ſown with ſmall tithes, the parſon.

For, by DOLBEN and GREGORY, *Juſtices*, otherwiſe the principal part would be transferred to the vicar.

But

WHARTON *againſt* LISLE.

But EYRE, *Juſtice*, ſaid, in that caſe he ſhould not have them, unleſs by uſage.

EYRE, *Juſtice*, took a difference, which was not denied, as to tithes of hemp, ray-graſs, &c.; if they are ſowed for ſeed, the parſon ſhall have them, as of grain: if mowed, as hay, the vicar ſhall have them, as of herbs *(a)*.

(*a*) On a bill in chancery claiming *great tithe* of potatoes ſowed in large quantities in the common fields, HARDWICKE, *Lord Chancellor*, determined, that the quantity makes no difference in the nature of the tithe, and adjudged them to be *ſmall tithe*, Smith *v.* Wyatt, 2. Atk. 365. It has alſo been decided, that a field ſowed with clover, which was cut for hay, is ſmall tithe, Wallis *v.* Pain and Underhill, Comy. Rep. 633. So alſo, that the ſeed of the ſecond cutting of clover is ſmall tithe, Wallis *v.* Pain, Bunb. 344 —See alſo Crouch *v.* Riſden, 1. Sid. 443.; Tilden *v.* Walter, 1. Sid. 447.; and the ſtatute 11. & 12. *Will.* 3. c. 16.

Caſe 85.

* Harcourt *againſt* Fox.

The clerk of the peace is not removeable by a ſucceeding *cuſtos rotulorum*, but has a freehold in his office.

S. C. 1. Show. 426. 506 516. S. C. 4. Mod. 167. S.C.Comb.209. S.C. Show.P.C 158. S. C. Holt, 189. S.C. 1. Ld. Ray. 161. Ante, 13.

INDEBITATUS ASSUMPSIT; and *non aſſumpſit* pleaded. The jury found the ſtatute of 37. *Hen.* 8. c. 1. and 1. *Will. & Mary*, c. 21. and the ſeveral clauſes in them about the clerk of the peace; that the *Earl of Clare* was *cuſtos rotulorum* of *Middleſex*, and that he named the plaintiff to be clerk of the peace, to exerciſe the office by him or his ſufficient deputy, *quamdiu ſe bene geſſerit*; that the plaintiff was capable of the office, and duly admitted; that the *Earl of Clare* was afterwards removed, and the *Earl of Bedford* made *cuſtos rotulorum*; who conſtituted by writing under hand and ſeal the defendant, during the time he was *cuſtos rotolorum*, *quamdiu* the defendant *ſe bene geſſerit*: and on ſolemn argument judgment for the plaintiff.

EYRE, *Juſtice*. The plaintiff continues clerk of the peace notwithſtanding the *Earl of Clare*'s removal; but if the plaintiff's title was not good, he ſhall not take advantage of the limitation of the defendant's title, though that be bad; *quod* DOLBEN, *Juſtice*, agreed. What this office formerly was, cannot be collected; but from 37. *Hen.* 8. c. 1. this act was declaratory; and the thing deſigned was, that the office ſhould be executed by able perſons, and be under the power of the *cuſtos*. That ſtatute not well providing this, the ſtatute of 1. *Will. & Mary*, c. 21. was made to take him out of the power of the *cuſtos*, and put him under the power of the ſeſſions; and therefore this ſtatute has ſeveral reſtrictions more than the other. The words of this ſtatute plainly give him an eſtate for life, *quamdiu ſe bene geſſerit*; and this is an enacting clauſe, and excludes the limitation by the former ſtatute, for *expreſſio unius eſt excluſio alterius*; it is penned in an affirmative, which always implies a negative.

GREGORY and DOLBEN, *Juſtices*, of the ſame opinion; and they ſaid, that the words "that the *cuſtos rotulorum* ſhould nomi-" "nate (*a*) the clerk of the peace, where he found the place void," plainly ſhews that he does not depend on the *cuſtos*.

(*a*) And this nomination may be by parol without deed, Saunders *v.* Owen, poſt. 199. Salk. 467. 5. Mod. 386. Carth. 426.

HOLT,

HOLT, *Chief Juſtice*, of the ſame opinion. It is to be conſidered who this officer was; and it is plain, the *cuſtos rotulorum* is no officer time immemorial, becauſe the commiſſion of the peace, to which it relates, is not ſo; for juſtices of the peace were not made until *Edward the Third*'s time, in lieu of conſervators; and the ſtatute which gives them complete power is the 34. *Edw.* 3. c. 1.; and legally, even to this day, they have the power of the records; but * becauſe of inconvenience that might happen, it was in the power of the king to name a particular perſon for keeping the rolls; and therefore all writs of error and *certiorari* are directed to the juſtices, but actually the records are in the cuſtody of the *cuſtos*, and he is liable to anſwer all loſſes to the king and ſubject reſpectively; whence it is plain, no perſon could be *cuſtos rotulorum* without being a juſtice of the peace. It was incident to the office of lord chancellor, in the name and ſtile of the king, to nominate the *cuſtos rotulorum* without warrant or bill ſigned from the king, as he does at this day in all ordinary adminiſtration of juſtice; as *oyer* and *terminer*, gaol-delivery, &c. Then comes the ſtatute of 37. *Hen.* 8. c. 1.; and it is thereby provided, "that he ſhall be nominated by bill "ſigned;" but becauſe of inconveniencies comes the 3. & 4. *Edw.* 6. and reſtores it again to the lord chancellor, without bill ſigned. Then comes this ſtatute of 1. *Will. & Mary*, c. 21. concerning the nomination of clerk of the peace, who by the import of the words has an eſtate for life, of which there had been no doubt if the word "only" had been left out. This act commits the power of the *cuſtos* without reſpect to his intereſt, and only as to his poſſeſſion; and the *cuſtos* having executed the power, by putting in the clerk of the peace, the clerk is now in by the ſtatute and the limitation of it. In this ſtatute the words of 37. *Hen.* 8. *viz.* "as long as the "*cuſtos rotulorum* ſhall continue," are left out, and the words "as "long as the clerk of the peace ſhall demean himſelf well" are put in. As to the *cuſtos rotulorum* the ſtatute of 37. *Hen.* 8. is revived, but not alſo clerk of the peace; if they had intended it ſhould have gone with the *cuſtos rotulorum*, there need not have been any clauſe put in. The deſign was to put the clerk of the peace under the power of the juſtices, who could not diſplace him before. This ſtatute has made ſeveral alterations, and the parliament intended to make a proviſion, that the ſeſſions ſhould be always furniſhed with a good clerk; and that he might have encouragement if he executed his office well, gave him ſo large an eſtate; and ſo prevent the inconveniencies which may happen by embezzlement of the rolls, &c. when the clerk is ſo often removed, and the place held precariouſly.

HARCOURT *againſt* FOX.

* [43]

Judgment for the plaintiff; and it was afterward affirmed in parliament.

Anonymous. Caſe 86.

HOLT, *Chief Juſtice*. An executor may juſtify payment of a ſtatute, when a judgment is ſuſpended by writ of error.

Vide Yelv. 29. Poſtea, Mich. 5 *Will & Mary*, Anonymous.

Maſters

Caſe 87. * Maſters *againſt* Marriot.

S.C. 3 Lev. 363. S. C. Skin. 347. S. C. Holt, 26.

WHERE a ſpecial requeſt in an *aſſumpſit* ſhould be al and is not, it is fatal on demurrer, but helped after v

Caſe 88. Anonymous.

Notice.

WHERE a certain perſon is mentioned, as if it were, i pay ſo much money, &c. no notice is neceſſary; but as anybody ſhould pay, which is uncertain, there muſt be n

Caſe 89. Anonymous.

Forcible entry.

IF A JUSTICE OF PEACE record a force on view, you ſl aver againſt it.

Caſe 90. Anonymous.

Pleading.

PER SIR SAMUEL ASHTREE. "*Solvit ad diem*" is no iſſue; but becauſe it is an ordinary plea, the clerk d make up a paper-book of it.

Caſe 91. Lamb *againſt* Archer.

Term limited to *A.* and the heirs of his body, and if he die without iſſue, living *B.* then to *B.* it is a good limitation.

S.C. 1. Eq. Abr. 192. S.C. 1. Salk. 225. S.C. Comb. 208. S.C. Carth 266. S. C. Holt, 227. S. C. Skin. 340. 3. Lev. 23. Palm. 48. 333. 2. Roll. Rep. 129. Cro. Jac. 459.

SPECIAL VERDICT, that *J. B.* was poſſeſſed of a term fo and had iſſue two ſons, *R.* and *J.* by his wife *E.* and de *R.* after the widowhood of his wife *E.* "during the remai "the term of years which I have to come in tail male;" want of ſuch iſſue as aforeſaid, then he gives to *J.* as af The contingency has happened.

And THE WHOLE COURT held it a good limitation, for no danger of a perpetuity, becauſe the contingency was to within a life. The words "heirs males of his body" in the tion are void, but the ſubſequent words are good; and th words will reſtrain the former, and make them good: a differs from *Gibbons v. Somers* (*a*), for there the dying iſſue was indefinitive; and *Child v. Baily* (*b*) has been oft ken, and almoſt deſtroyed, by ſubſequent reſolutions (*c*).

(*a*) 3. Lev. 22.
(*b*) 1. Eq. Abr. 192. 2. Roll. Rep. 129. Palm. 48. 333. Cro. Jac. 459. 1. Jones, 15.
(*c*) See 1. Eq. Abr. 193.

MICHAELMAS TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Anonymous. Caſe 92.

WHEREVER coſts are adjudged *de incremento*, it ought to be *eidem quer. ex aſſenſu ſuo*, adjudged. 2. *Saund.* 107. Coſts.

Anonymous. Caſe 93.

IF ACTION be brought againſt an adminiſtrator by name of executor, he cannot plead in bar *ne unques executor*, and give in evidence he was adminiſtrator, becauſe he allows himſelf to be ſuable. Vide the next page, Harding v. Salkill.

Anonymous. Caſe 94.

IF there be a joint declaration againſt two, and attorney appears for one of them, and takes a joint declaration, this does not imply an appearance for the other. Appearance.

Anonymous. Caſe 95.

NO DECLARATION ſhall be entered after the ſecond Term, though a *nolle proſequi* be not entered, which may be entered in the Vacation after the ſecond Term, as of the ſecond Term, *quia non comparuit infra Terminum.* Practice.

Midgley's

Caſe 96. Midgleys *againſt* Lovelace.

Aſſignee of a reverſion may bring covenant for arrears of rent due before he granted the reverſion over.

ASSIGNEE OF A REVERSION, and aſſignee of a term. aſſignee of the reverſion granted over his reverſio afterwards brought covenant againſt the aſſignee of the te rent arrear before the grant of the reverſion.

And on demurrer, TOTA CURIA, If at common law the a of a reverſion had granted it over, yet he might afterwards h * [46] * action of debt for rent, though he could not diſtrain o waſte, becauſe his power over the land was determined. It i where a man ſeiſed of a rent in fee grants it over, there he l remedy for the arrear, becauſe the diſtreſs, which was his onl is gone by the aſſignment; but where rent is reſerved upon for years it is otherwiſe, becauſe debt lies on the contract here the aſſignee ſhall have it as a fruit fallen from the reverſ

S.C.Carth. 289. S. C. Holt, 74. Co. Lit. 215. 2. Show. 134. Cro. Jac. 521. 32. *Hen.* 8. c. 34.

Judgment for the plaintiff.

Caſe 97. Harding *againſt* Salkill.

Adminiſtrator and not executor pleaded in bar ill.

DEBT againſt the defendant as executor to one *M.* T fendant pleaded, that *M.* died inteſtate, and adminiſtrati granted to him. The plaintiff demurred.

S.C.1.Salk.296. S.C.Comb. 220. S. C. Skin. 365. S. C. Holt, 306.

And it was ſaid to be a good plea; for if he be adminiſ he is not chargeable as executor, or *è converſo*; and ſo is 305. *b.*

Ante, 45. Comb. 220. Vide poſtea, Mich. 7. *Will.* 3. Bowers and his Wife *v.* Coke. 1. Mod. 239. 8. Mod. 244. 288. Comy. 150. 1. Lev. 235. 2. Stra. 1106. 3. Pr. Wms. 349.

Sed non allocatur, for that caſe is not law, and rather an ev to charge the defendant than diſcharge; this might have bee pleaded *in abatement*, but it is no plea *in bar*.

And by HOLT, *Chief Juſtice*, If an action be brought an adminiſtrator by the name of executor, and judgment again and afterwards another action is brought by the name of a ſtrator, he may plead the former judgment in bar, *ultra quod*

And judgment was given for the plaintiff.

Caſe 98. The Maſter, Warden, and Company of Cutle Highamſhire, *againſt* Buſkin.

A by-law that a cutler ſhall only take one apprentice at a time is good.

DEBT ON A BY-LAW for forty ſhillings penalty, that a ſhall keep no more than one apprentice. Breach al that the defendant *duas perſonas ut apprenticios cepit et cuſ* and ſo did not ſay that they were apprentices.

Hard 56. 2. Burr. 892.

But CURIA *è contra*; for the deſign of the Company was by-law to hinder any member from qualifying more than o time; but if he had taken one to live with him in the exerciſ trade for ſeven years, this is a ſufficient qualification, thou party is never bound as an apprentice; and he ſhall hav privileges with one bound.

Nor

NORTHEY moved, that the plaintiff might have coſts, the action being * brought for a ſum certain of forty ſhillings as a penalty. *Vide Cro. Car.* 559, 560.

Where in an action brought for a ſum certain, as a penalty, the party ſhall have coſts. S.C Comb. 224. S. C Skin. 363. S. C. Holt, 172. 1. Vent. 133.

And PER CURIAM, That is a ſettled caſe, and coſts were awarded; but with this difference put by HOLT, *Chief Juſtice*, that where the action is brought by the party grieved, and the penalty certain, he ſhall have coſts, becauſe the defendant ought to have paid it without ſuit; and when a penalty is given to the party grieved, it is certain to whom payment ought to be made; but where brought by a common informer he ſhall not, for he is altogether uncertain, and has no title to money until he bring his action, and it is that veſts an intereſt in him.

Colethirſt *againſt* Wiſeman. Caſe 99.

ERROR OF A JUDGMENT in an action on the caſe in the inferior court of *Hull*.

Capias was the firſt proceſs in inferior court; cured by appearance.

The error aſſigned was, that a *capias* was the firſt proceſs; and the caſe of *Tuthil v. Milton* (*a*) was cited.

Vide Sir T. Jones, 165. 1. Inſt. 325. a.

But PER CURIAM, That caſe is not law, and ſo it has been often ruled; for it is but a miſconveyance of proceſs, and is helped by appearance.

The judgment was affirmed.

(*a*) Yelv. 158.

Badgerly *againſt* Wood. Caſe 100.

PROHIBITION to the ſpiritual court for tithe pigeons, on ſuggeſtion that they were ſpent in the houſe.

Tithe of pigeons ſpent in the houſe not due.

HOLT, *Chief Juſtice*, doubted.

The King and Queen *againſt* Wright. Caſe 101.

INDICTMENT for foreſtalling *centum et octoginta aves* (ANGLICE "turkeys").

For foreſtalling "*aves*," ANGLICE turkeys, good. S.C.Comb. 225.

Moved in arreſt of judgment, that it was uncertain, and could not be ſupplied with an ANGLICE. *Stile*, 313. *Noy*, 68.

But CURIA *contra*, on the authority of *Hardres*, 361. which was a caſe in point.

Jones *againſt* The Biſhop of Llandaff. Caſe 102.

PROHIBITION granted to the ſpiritual court, becauſe the biſhop articled againſt his chancellor for inſufficiency and other miſdemeanors, and prayed that he might be deprived, which they have no power to do; and they denied *Sutton's Caſe* (*a*) to be law.

Prohibition to the ſpiritual court on ſuit there to depoſe a chancellor.

(*a*) Cro. Car. 65. S. C. Cobb. 390. S. C. Latch, 228. S. C. Noy, 91. 1 C. Palm. 450. S. C. Lit. Rep. 2. 22.

Caſe 103.

* The King *againſt* Hebbard.

Treſpaſs, aſſault, and battery; if the defendant in his plea varies from the time; he muſt aver *quæ eſt eadem tranſgreſſio*.—S. C. Holt, 548.

HOLT, *Chief Juſtice.* In treſpaſs, aſſault, and battery, if the defendant in his plea vary from the time alledged, he muſt aver *quæ eſt eadem tranſgreſſio*; but where he agrees in the time, he need not.

Caſe 104.

Anonymous.

Debt on a judgment; plea writ of error depending in the exchequer-chamber, ill.

DEBT ON JUDGMENT in this court. He pleads in abatement *quod adhuc reſpondere non debet*, becauſe of a writ of error depending in the exchequer-chamber. The plaintiff demurred.

And IT WAS ARGUED *for the plaintiff*, that an action lay; for if it would not lie before affirmance, it would be to no purpoſe that action of debt might be brought on a judgment; for after affirmance the plaintiff may ſue execution; and no man that can ſue execution will be at the trouble of bringing an action of debt. 1. *Sid.* 236. is a caſe in point; and the difference there between a writ of error of a judgment in the king's bench and ſuch a writ of error as this had no foundation in law.

Quod HOLT, *Chief Juſtice, conceſſit*; for debt will lie in the common pleas upon a judgment there, after error in the king's bench, as well as on a judgment here, after writ of error in the exchequer-chamber.

HOLT, *Chief Juſtice.* It is ſtrange, that a writ of error ſhould ſuperſede an execution by one mean, and yet allow a man to come at it by another: there was no remedy at common law for debt or damages, when a year had paſſed after judgment, but by action of debt, until the ſtatute of *Weſtminſter the Second* gave a *ſcire facias* after the year; and it is reſolved, *Yelv.* 29. that an executor could not plead a judgment againſt his teſtator after error brought in bar of a *ſcire facias* upon a ſtatute, becauſe it was doubtful whether it ſhould be affirmed or not: but I will be bound by conſtant reſolutions of this Court, which are, that this is no plea in bar or in abatement. It is true, there have been ſome reſolutions to the contrary in the exchequer-chamber, and judgments have been reverſed there in my LORD NORTH's time for this error; and in CHIEF BARON TURNER's time, and particularly in the caſe of *Danvers v. Smith*; but that was a new notion.

Ante, 43.

DOLBEN and EYRE, *Juſtices, acc. (abſente* GREGORY).

EYRE, *Juſtice*, cited *Mod.* 121.

And THEY ALL AGREED, there was no difference between its being pleaded in abatement and in bar; and ſo is the eighth of *William the Third*, PER TOTAM CURIAM.

HILARY

HILARY TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
} *Juſtices.*

Edward Ward, *Eſq. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

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* Benſon *againſt* Scott.

Caſe 105.

EJECTMENT. Special verdict, that *Scot* was ſeiſed of copyhold lands in fee, according to the cuſtom of the manor, and ſurrendered to the uſe of *M. Collard*, upon condition, at on payment, &c. the ſurrender ſhould be void; the condition preſented broken; *Scott* dies; *M. Collard* is admitted, who ſurnders to the leſſor of the plaintiff, who was heir to *Scott*. They id the cuſtom within this manor, that the wife of the copyholder all have her *frank-bank* of the copyhold lands of which her huſnd died ſeiſed; and that after the death of *Scott*, the defendant, ing relict, entered, and was admitted according to the cuſtom, id continues yet a widow.

A copyhold eſtate ſurrendered on a condition to be void on payment of a ſum of money, will, on nonperformance of the condition, defeat the wife of the *ſurrenderor* of her *freebench*.

And PER TOTAM CURIAM, The admittance of *M. Collard* all avoid the *frank-bank*, to which otherwiſe the wife is intitled; r though the leſſor of the plaintiff be found to be heir, yet that es not alter the caſe, for he comes in as purchaſer, and is in of r eſtate; and the *frank-bank* is not inchoate by marriage, like ower, for if it were a leaſe or alienation in the huſband's life ould not bind it as it does, but it depends purely on the dying ſeiſed; but this was defeaſible by admittance of the ſurrenderee; nd when that comes, the *frank-bank* muſt fall with the eſtate out f which it is extracted *(a)*.

S.C.4.Mod.251. S.C.3.Lev.385. S.C. Salk. 185. S.C.Comb.233. S. C. Skin. 406. S C.Carth.275. S C Holt, 160. 1. Roll. Abr. 508. Poph. 105. Gilb. Ten. 321.

(a) See Farvey's Caſe, Cro. Jac. 36. Hall v. Hard, Cowp. 481. Paine v. Hacke, Cro. Car. 568. Anonymous, 1. Freem. 516. Saliſbury v. Arrowſmith, Poph. 105. Anony-

Caſe 106.

Anonymous.

Whole hundred is the *viſne*.

HOLT, *Chief Juſtice*. The whole hundred where the place is, is the *vicinetus* thereof.

Caſe 107.

* Anonymous.

Vide 1. Cro. 340. 448, 449. 4. Inſt. 164.

AT THE QUARTER-SESSIONS, there may be a trial the ſame ſeſſions, if there be an adjournment, ſo as there may be fifteen days between the *teſte* and return.

Caſe 108.

Batſon *againſt* Goodwin.

Plea that the indorſee was a bankrupt at the time of the indorſement, but muſt plead that a commiſſion was taken out.

ACTION ON THE CASE by *an indorſee* againſt the *firſt drawer* of a bill of exchange. The defendant pleaded, that the indorſer, at the time of indorſement, was a bankrupt. Demurrer.

PER CURIAM. This is a good plea in bar, for a bankrupt is diſabled to aſſign a bill: but then he ought to have pleaded a commiſſion taken out: wherefore

Judgment was given for the plaintiff.

Caſe 109.

Hibbord *againſt* Coulthrop.

An *aſſumpſit* for *work and labour* generally is good.

S.C. Carth. 276. S.C. Skin. 409. Hob. 18. 216.

IN ASSUMPSIT, the error aſſigned was, that it was for *work and labour*, without ſhewing what.

Sed non allocatur; for it is enough to ſhew, that it was upon a ſimple contract upon which this *aſſumpſit* can ariſe; and the Court will not intend it to be an illegal conſideration (*a*).

1. Brownl. 14. 1. Bulſt. 153. Cro. Jac. 397. 548. 593.

(*a*) Gardiner *v.* Bellingham, Hob. 5. Woodward *v.* Deacon, Cro. Jac. 206. Rooke *v.* Rooke, Cro. Jac. 245. More *v.* Conham, Owen, 123. Fowke *v.* Pinſack, 2. Lev. 153. Ruſſell *v.* Collins, 1. Mod. 8. S. C. 1. Sid. 425. S. C. 2. Vent. 44. S. C. 2. Keb. 552. Dixon *v.* Willoughs, 1. Salk. 446.

EASTER TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Edward Ward, *Knt. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

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* The King *againſt* Tucker. Caſe 110.

Indictment for treaſon, not ſaying *contra ligeantiæ ſuæ debitum.*

S. C. 3. Lev. 376.
S. C. 4. Mod. 162.
S. C. 2. Salk. 630.
S C. Comb. 257.
S C. Skin. 338. 360. 425. 442.
S. C. Carth. 317.
S. C. Show. P. C. 186.
S. C. Holt, 678.

ERROR to reverſe an attainder of high treaſon, in which there were two exceptions taken;

FIRST, The omiſſion of amputation of ſecrets.

SECONDLY, Of *contra ligeantiæ ſuæ debitum*, in the concluſion of the indictment.

HOLT, *Chief Juſtice*, and EYRE, *Juſtice*, held, that the cutting out of the members was not a fatal fault; for though it be part of the judgment, yet it is not found in a precedent before the twelfth year of *Charles the Second*; and therefore if we ſhould reverſe it on this account, it would let in a great confuſion on men's inheritances who purchaſed under attainders.

But SAMUEL EYRE, *Juſtice*, in this, would give no opinion.

SED PER TOTAM CURIAM, The other, of *ligeantiæ ſuæ debitum*, is fatal; though a few records were ſhewn where they were omitted, as the record mentioned in *Benſted's Caſe (a)*, *Sir Harry Vane v. Lambert*, in the fourteenth year of *Charles the Second*; *Cotton v. Meſſenger*, in the twentieth year of *Charles the Second*.

(a) 1. Cro. 583.

THE KING *againſt* TUCKER.

SAMUEL EYRE, *Juſtice.* Theſe words are neceſſary in the concluſion of the indictment, becauſe he who owes no allegiance is not indictable; as an alien enemy, 7. *Co.* 6. *b.* 3. *Inſt.* 11 1. *Inſt.* 129. *Dyer*, 144. *Hob.* 271.

GILES EYRE *accord.* Every indictment ought to contain ſufficient form and matter, and an apt concluſion; and as to the two firſt of theſe, and that the fullneſs and certainty cannot be ſupplied by argument or implication, he cited 2. *Cro.* 20. 3. *Cro.* 93. 5. *Co.* 121. And to the apt concluſions, and that without them they are erroneous, he cited 2. *Cro.* 527. 2. *Roll. Abr.* 82. where *contra pacem* is held a neceſſary concluſion on indictment, and *contra formam ſtat.* has been held neceſſary upon * indictment on a ſtatute, and want of them error. 2. *Cro.* 142. And no words will ſupply this.

*[52]

HOLT, *Chief Juſtice, acc.* An alien enemy cannot commit treaſon, and therefore theſe words are neceſſary, and cannot be ſupplied by any other words, no not by *debitum ligeantiæ minimè ponderans*, becauſe he may not well conſider allegiance, and yet not act againſt it; nor by the words *contra dominum regem verum et indubitatum dominumſuum*, becauſe theſe are not words of neceſſity, but put in lately; for in former times were only *contra dominum regem*, 1. *Cro.* 120. 122. And words unneceſſary ſhall never ſupply words neceſſary and requiſite; but I do not think theſe words neceſſary in the concluſion, but ought to be averred ſomewhere. I have ſeen ſeveral precedents which have them in the beginning. *Contra naturalem dominum* will not ſupply it; and the omiſſion of *contra pacem* is error, though breach of peace appears plainly in the indictment.

SAMUEL EYRE, *Juſtice*, delivered *Juſtice* GREGORY's opinion to be the ſame.

Caſe 111.

Goodright *againſt* Corniſh.

Deviſe for fifty years to *A.* if *A.* ſhould ſo long live, and after to the heirs male of *A.*; and for default of ſuch iſſue to *B.* in tail; the remainder to the heirs of the body of *A.* is void, there being no freehold to ſupport it, and the remainder to *B.* takes effect preſently.

EJECTMENT. Special verdict, that in the year 1663 one *Knowling*, ſeiſed of lands in fee, had iſſue three ſons, *J. K.* and *R.* and on the twenty-ſeventh of *March* made his will and deviſed his lands to his ſon *J.* for fifty years, if the ſaid *J.* ſhould ſo long live; and after the determination of the ſaid term, then to the heirs males of the ſaid *J.*; and for default of ſuch iſſue to *K.* in tail; the remainder to *Robert* the third ſon in tail male; remainder to the right heirs of the deviſor. They find, that the deviſor died ſeiſed, that *J.* the ſon entered, and in the third of the king and queen he ſuffered a common recovery, as tenant to the *præcipe*, brought by one *J. R.*; that the recovery was to the uſe of himſelf for life and after his death to his firſt and every other iſſue; and for default of iſſue of his body, to the defendant in fee. They find

S. C. 4 Mod 255. S. C. Salk. 226. S. C. Holt, 227. S. C. Comb. 254. S. C. Skin. 408. S. C. 1. Ld. Ray. 3. Vide poſtea, Paſch. 11. *Will.* 3. Scattergood v. Edges, ante, 39

that

hat *J.* the ſon died ſeiſed without iſſue; the defendant entered; and that *K.* the ſecond ſon died, leaving *J. K.* the leſſor of the plaintiff. GODRIGHT *againſt* CORNISH.

And PER CURIAM, *J.* had no eſtate-tail, and the recovery did not bind *R.* who had good title.

HOLT, *Chief Juſtice*, relied on 2. *Leon.* 70. and ſaid, that if the words, "if the eldeſt ſon die without iſſue," in that caſe, would not make an eſtate tail by implication in the eldeſt ſon, *à fortiori* the words * in this caſe ſhall not, there being a term for years expreſsly given, which ſhall not be drowned by implication of law. And he likewiſe ſaid, that remainder limited by the deviſe to the heirs of the body of *J.* was void, having no freehold to ſupport it; and that *per verba de præſenti* one could not deviſe an eſtate to the heir of one living, but *per verba de futuro* one may, *viz.* to the heirs of *J. S.* after the death of *J. S.*; and this ſhall enure as an executory deviſe: and ſo WINDHAM held in the caſe of *Snow v. Cutler*, where he held a deviſe to an infant *in ventre ſa mere* good *per verba de futuro*, *viz.* take after he was born, otherwiſe *per verba de præſenti*; and the remainder limited to the heirs of the body of *J.* being void, the next remainder limited to *K.* muſt take effect preſently. That this was not an executory deviſe to the heir of the body of *J.* it being limited expreſsly as a remainder. But admitting it were ſo, yet it could veſt no eſtate in *J.*; and he dying without iſſue, the eſtate deviſed to the heir of his body, though it did take effect as an executory deviſe, muſt be void. * [53]

Reeve *againſt* Long. Caſe 112.

ERROR in the court of common pleas in ejectment. Special verdict: *J. Long* ſeiſed in fee had three brothers, *A. B.* and *C.* and deviſes theſe lands to *A.* for life, remainder to the firſt ſon of *A.* in tail male, and ſo to the ſecond and third ſons; and for default of ſuch iſſue to *B.* for life, and to his firſt, ſecond ſon, &c. in like manner: the deviſor dies, *A.* being unmarried; *A.* marries and dies without iſſue born, but the wife was *privement enſeient* with a ſon, who is born after. The judgment in the common pleas was, that the poſthumous ſon had no title; and it was affirmed here: and they held, that a remainder to the firſt ſon of *A.* was a contingent remainder, and ſo muſt take effect, according to the rule in *Archer's Caſe*; but at the time of the death of *A.* there was a default of iſſue male, on which the eſtate veſted in the poſſeſſion of *B.* and ſhall not be removed againſt the birth of a ſon after. And this is no executory deviſe upon the rule laid down in 2. *Saund.* 388. Where a contingent eſtate is limited to depend on a freehold capable to ſupport the remainder, it ſhall never be conſtrued an executory deviſe. This judgment was reverſed in the Houſe of Lords (*a*).

S. C. 4. Mod. 282. S. C. 3. Lev. 408. S. C. Salk. 227. S. C. Skin. 430. S.C. Comb. 252. S.C. Carth. 309. S. C. Holt, 228. S.C. 2. Eq. Abr. 336. 4. Mod. 259. cited.

Vide 10. & 11. *Will.* 3. c. 16. proviſion for poſthumous children.

(*a*) See S. C. 4. Mod. 282.

Caſe 113. * Anonymous.

IF A WRIT be returnable here, though it iſſue out of chancery, this Court may compel the ſheriff to return the writ.

Caſe 114. Anonymous.

IF A WHOLE TERM intervenes, there may be execution againſt the bail, notwithſtanding a writ of error in parliament.

TRINITY TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

Combes *againſt* The Hundred of Bradley. Caſe 115.

ACTION upon the ſtatute of HUE AND CRY, by a ſervant who was robbed of his maſter's money.

A ſervant robbed of his maſter's money may ſue on the ſtatute of Hue and Cry, and cannot releaſe.

LEVINZ argued that he ſhould not; for by that means he might judice his maſter, by releaſing the action; and took a difference ween a ſervant, and a common carrier, and a ſheriff; for the o laſt have a ſpecial property, and may have trover.

But PER CURIAM, He ſhall not releaſe; and 1. *Brownl.* 155. a full authority.

S.C. Comb. 263. S. C. Holt, 37. S. C. 4. Mod. 303.

C. 2. Salk. 613. Stiles, 156. 2. Leon. 82. 3. Mod. 288. 4. Com. Dig. "Hundred" (C. 3.). Com. Dig. "Pleader" (2. S. 8.). 3. Bac. Abr. 69. 4. Bac. Abr. 279.

The Count of Arran *againſt* Criſp. Caſe 116.

THE PLAINTIFF made a leaſe to the defendant in 1675, reſerving ſuch a rent, and the defendant covenanted to pay the ſaid rent "clear of all taxes and aſſeſſments whatſoever impoſed or to be impoſed," and gave bond for performance of covenants; and ſued on this bond, after * *oyer*, the defendant pleaded "conditions performed." The plaintiff replied the leaſe and covenants, and aſſigns for breach the defendant's not paying two years rent at *Lady-*

Covenant to pay *taxes* generally includes *parliamentary taxes.*

* [55]

S. C. Salk. 221. S. C. Holt, 549.

COUNT OF ARRAN *againſt* CRISP.

Lady-Day laſt. The defendant rejoined, and ſays, he paid ſo much in money, and ſo much in taxes payable by the act of four ſhillings aid *per* pound, amounting in all to the rent due. The plaintiff demurs.

The queſtion was, Whether this covenant extends to charge the defendant with *parliamentary taxes*, becauſe the word "parliament" is not expreſſed in the covenant?

And THE WHOLE COURT, except HOLT, *Chief Juſtice*, was clearly of opinion it did.

Departure.

1. Inſt. 304. a. 1. Lev. 81.

But *per* HOLT, *Chief Juſtice*, Judgment ought to be for the plaintiff for a fault in pleading, though the law, as to the matter, be for the defendant; for the matter of this rejoinder, being by way of excuſe, ought to be ſet forth in the bar; and as it is here ſet forth in the rejoinder, it is a departure; for where before he ſays he performed the condition, now he ſays he is not obliged to it.

Judgment for the plaintiff.

Caſe 117.

The King and Queen *againſt* Knowles.

On an indictment for murder by the name of *Charles Knowles*, he pleaded in abatement, that he was *Earl of Banbury*, and held a good plea.

S. C. 1. Salk. 47.
S. C. 2. Salk. 509.
S. C. 3. Salk. 242.
S.C. Comb. 273.
S.C. Carth. 297.
S.C. Skin. 336. 517.
S. C. Trem. 11.
S. C. 1. Ld Ray. 10.
S. C. 8. St. Tr. 50. 58.

CHARLES KNOWLES was indicted for a murder, and the indictment was removed into the king's bench by *certiorari*, and the defendant brought to the bar by *habeas corpus*; and he pleaded in abatement to the indictment, that *King Charles*, in the ſecond year of his reign, did, by letters patent, produced now in court, create *William*, then *Viſcount Wallingford*, *Earl of Banbury*, and granted the honour to him and the heirs males of his body: that *William Earl of Banbury* died ſeiſed of this honour; and that it deſcended to *Edward Knowles*, ſon and heir of the ſaid *William*: that *Edward* dying without iſſue, it deſcended to *Nicholas Knowles*, his brother and heir, and ſon and heir-male of the body of *William*: and that *Nicholas* died, leaving iſſue an heir of his body, *Charles* the defendant; by virtue of which patents and deſcents he became *Earl of Banbury*; and becauſe he is not named *Earl of Banbury* in the indictment, he prays judgment if he ſhall be put to anſwer.

THE ATTORNEY-GENERAL, proteſting that no part of the ſaid plea is true, replies, that on the thirteenth of *December*, in the fourth year of *William and Mary*, the defendant preferred a petition to the lords ſpiritual and temporal in parliament aſſembled, in which, alledging that he was a peer of this realm, he deſired that he might be tried by his peers; and upon this *taliter proceſſum fuit ſecundum legem et conſuetudinem parliamenti*; yet it was reſolved, * conſidered, and ordered, by the lords, &c. that he had no hereditary right to the earldom of *Banbury*; and that his petition ſhould be diſmiſſed. To this replication the defendant demurred.

* [56]

SAMUEL EYRE, *Juſtice*. This order of the houſe of lords does not bar the defendant of his peerage, nor conclude the Court from examining the force and effect of the order.

FIRST,

FIRST, All miſnomers here pleaded are within the juriſdiction this Court; and in ſuch a plea, the Court may judge whether e party that ſo pleads be a peer, or hath a title to peerage, or h

The court of king's bench to judge of the validity of all records and judgments pleaded there.

SECONDLY, That this Court ſhall judge of the validity of all idgments and records here pleaded, and whether they are legal nd effectual or no; as of an act of parliament, what is one; that n act by king and lords is not a good one; and ſo they may judge f an order of the houſe of lords, whether the concurrence of the ther eſtates of parliament, or one of them, be requiſite: ſo the Court may take judicial knowledge of the proceedings in parliament, and of their committees (*a*).

As to the objection, that the defendant hath, by his demurring, confeſſed this to be a judgment *ſecundum legem et conſuetudinem parliamenti*; this is matter of law ariſing thereon; and demurrer confeſſes only matter of fact, as ſtated, and leaves the matter of law ariſing thereon to the judgment of the Court (*b*).

A peer cannot be degraded but by attainder or act of parliament.

As to the order of the houſe of lords; all the books are, that a peer cannot be degraded but by attainder, or by act of parliament (*c*); nor can he by fine diveſt himſelf of his honour, as adjudged in *Lord Purbeck's Caſe* (*d*), becauſe the king and kingdom are intereſted in his honour, and therefore it cannot be taken away without their conſent. Where there has been a conteſt to whom an honour deſcended, upon petition to the king it has been referred to the lords, and by them examined, and their opinions reported to the king, as in my *Lord of Oxford's Caſe* (*e*). So in the caſe of a conteſt about precedency (*f*). And it is a great reaſon that the king, who creates all peers, ſhould be party to their deprivation.

To the plea; it is ſufficient, without averring *Banbury* to be in *England*; for the creation being by letters patent under the great ſeal of *England*, he ſhall be intended an *Engliſh* peer; for it is the letters patent, and not the title, that makes an *Engliſh* peer; and therefore the title may be taken from a foreign place, as *Earl of Angus*, *Duke of Albemarle*.

And as to the objection to the concluſion of the * plea, where it is ſaid, "*et hoc paratus eſt verificare*," without ſaying, "*per recordum*," and without a writ to certify his peerage, that is well enough. Trial by writ muſt be appropriated to peers created by writ; but peerage by patents appears by the patents themſelves. Where my *Lord Coke*, in his *Sixth Book*, ſays, that baron or not baron is tried *per* record, he ſays, baroneſs by marriage, being matter of fact, is triable by jury; and ſo are the deſcents in this caſe: the patents produced are good evidence of the firſt creation; but the plea, conſiſting of matters of fact, had been ill if it had concluded

* [57]

9. Co. 31. Poſt. 61.

(*a*) Lake v. King, 1. Saund. 133.
(*b*) Plowd. 85.
(*c*) 4 Inſt. 355. Cotton's Records, 722. 12. Co. 107.
(*d*)
(*e*) Jones, 97.
(*f*) 12. Co. 2.

THE KING AND QUEEN *against* KNOWLES.

to the record; but as it is the defendant's plea is good and t replication ill; and therefore the indictment ought to be quashe

GILES EYRE, *Juſtice, &c.* to the laſt point *in terminis*; for t patents produced have verified the firſt creation of his peera for the patents are a complete creation without more. 12. *Co.* 1 1. *Inſt.* 16. *Ney*, 150. When a patent is pleaded and produc in court, *nul tiel record* cannot be pleaded to it; the defce pleaded are matters of fact, and nobility gained by matter of fac triable by the country; and the caſe is the ſame if gained by defce there is no neceſſity of having a writ out of chancery to certify wh ther one be a peer by deſcent; and none of the caſes at the bar, t that, is applicable to this, for they are all writs of privilege and e emption. As to the ſecond objection, that *Banbury* is not *Engliſh* town, he held as before, and ſaid, that an *Iriſh* peer may created under the great ſeal of *England*, but then there muſt ſpecial and expreſs words, *viz.* an earl *in regno Hiberniæ*, &c *Tit. Hon.* 696. The reaſon of a certain place from whence to ta the title was to make an eſtate-tail within the ſtatute *de Don* which extends only to limitations which concern lands and ten ments; and therefore without naming ſome place a limitation an honour to one and the heirs males of his body would be a fe ſimple co ditional at common law, and if ſo would be forfeited attainder of felony, as an eſtate-tail of a baronetſhip, which is n created of any place. 12. *Co.* 81. 3. The defendant need n aver that he is *unus parium Angliæ*, for the pleading of the pate and deſcents ſhew that ſufficiently; but a biſhop, who is a pe *ratione tenuræ jure epiſcopatûs*, muſt plead he is *unus parium Angl* he having no patent to produce. As to the replication, he held, th does not avoid the plea, for the order of the houſe of lords is judgment nor bar to the defendant, for peerage cannot be tak away but by * attainder or act of parliament, or by *ſcire fac* (where created by letters patent) to repeal thoſe patents; for t king cannot revoke them, becauſe it is a common-law conveyan and thereby an intereſt is veſted and ſettled in the patentee. A w indeed may be ſuperſeded before an actual ſitting of parliame but otherwiſe of an honour created by patents. A writ gives a in the honour without expreſs words; but in caſe of letters pate the eſtate in the honour muſt be limited by apt words, or elſe it void; it may be intailed, and muſt deſcend according to the int of the common law, and was forfeited for treaſon before the ſtat of 26. *Hen.* 8. 7. *Co.* 34. As to the order; every vote of t lords is not a judgment; the defendant's petition cannot give t lords a juriſdiction, if they had none before, but upon petition the king, and reference to the lords; and this has been the cou uſed in my *Lord Delaware's*, *Oxford's*, *Abergavenny's*, *Purbeck* and *Fitzwater's Caſes*; and this courſe is moſt reaſonable, that t king being the fountain of honour, as nobility cannot be creat without him, ſo it ſhall not be determined without his conſent parliament. An earl is a public officer in time of war and pea and the king and ſubjects have an intereſt in him. 7. *Co.* 12.

Deſcents are matter of fact.

A biſhop having no patent to produce muſt plead he is *unus parium Angliæ*; not ſo of a lord.

* [58]

Peerage cannot be revoked. 1. Inſt. 16. b. 1. Inſt. 9. b.

A writ gives a fee in the honour, but in letters patent it muſt be limited by apt words.

An earl is a public officer.

THE KING AND QUEEN *againſt* KNOWLES.

Co. 28. 4. *Inſt.* 126. The king, by his prerogative, having ction of any of his courts to try his cauſe, he may, by indorſe- it of ſuch petition, refer the trial of it to any court, and thereby es the Court a juriſdiction of it. There is no precedent where lords exerciſed a juriſdiction to determine the right of peerage hout ſuch reference. The lords have a juriſdiction over their mbers as to their ſitting in parliament and precedency there, but over their members eſtates and inheritances in their honours; they are to be determined by common law. Their order does bind the liberty of the ſubject; as 2. *Inſt.* 47. about ſending le lawyers into *Ireland*. Inferior courts are not tied up from ging their proceeding void; as if a writ of error be brought in rliament of a judgment in the common pleas, whereas it ſhould ve been in the king's bench, the common pleas may adjudge the rit of error void, and no *ſuperſedeas*, and may award execution; the king's bench, notwithſtanding this error, may examine the dgment upon writ of error. As to the demurrer; that confeſſes ly matter of fact, and not of law; *et lex parliamenti* is matter of w. As to the precedents; they are petitions, ſitting the parlia- ent, for trial. A peer cannot waive his * trial by peerage; . *Inſt.* 30. but the king is not bound by their order for a trial, for e may chooſe whether he will appoint a high ſteward. In the *rd Preſton's Caſe*, there was no creation of honour at all; it was ot under the great ſeal of *England*, and the ſetting it up as a crime next to treaſon. *Piercy's Caſe* concerned pre- dency for a place to ſit in the houſe; and after ſeveral trials d tranſlations below, and depoſitions and Counſel heard re, he was declared an impoſtor; and ſo concluded for the defen- ant.

The King and Queen againſt Knowles.

The lords have power as to precedency there, but not over the eſtates of the members.

Show. Parl. Caſ. 1.

Contra reſolved in the lords.

Keyl. 56.

* [59]

GREGORY, *Juſtice, accord. in omnibus.*

HOLT, *Chief Juſtice.* The plea is good, and the replication ad. By the plea, the defendant has made a good title to the dig- ity in the anceſtor by letters patent, and by deſcent to himſelf. IRST, As to the exception that it does not appear that *Banbury* s an *Engliſh* town, he ſaid, an earl created by letters patent under he great ſeal of *England* ſhall be intended an *Engliſh* peer, if not therwiſe expreſſed; and to make this the clearer, he examined he original and antiquity of earls. An earldom formerly conſiſted f three things, dignity, office, and revenue. As to the dignity: Earl, what. Before *Edward the Third*'s time there were only earls and barons; arons were firſt created by tenure, and afterwards by writ, and ince 11. *Rich.* 2. by letters patent; earls were always created by patents. *Seld. Tit. Hon.* 536. 538, 539. Secondly, Their office Poſtea, Mich. is of truſt, for the ſafety and defence of the realm; they are not 7. *Will* 3. Lord called *comites* from the county, but *à ſocietate regiâ*; they aſſiſted and Lady Ger- the king in war and peace; and therefore an earldom in tail before rard. 26. *Hen.* 8. was forfeited for treaſon, by a tacit condition annexed 9. Co. 49. a. in law, becauſe of the breach of truſt and confidence in the party that was made noble, and ſo *contra officii ſui debitum.* 7. *Co.* 34.

Thirdly,

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Thirdly, Their revenues were caſtles, or other profits annexed their honours, and ſuitable for the ſupport of their dignity; whi was the reaſon that by *Magna Charta* an earl's heir was to pa relief of an hundred pounds, whatever was his portion; and relief of an earl and a baron were ſettled at different rates: but proceſs of time, theſe revenues annexed to the honour diminiſh but while the revenue was annexed *ſub nomine et honore*, the re continued the ſame; and therefore the words are not *ſub nomin honore*, but *ad ſuſtinendum nomen et onus*. 2. *Inſt.* 9. 1. *Inſt.* 88 So the revenue not being annexed, as formerly, earls have not p relief *pro integro comitatu*, but as other perſons, according to th poſſeſſions; but the place from whence an earl is named is bu * titular diſtinction, and no part of the dignity. The earldom not confined to the place, but extends through the whole kingdo SECONDLY, The great ſeal is proper and peculiar to *Engla* and to no other place; for by that ſeal the king acts as *King England* only, without reſpect to any other dominion. If bef the conqueſt of *Ireland* one was created by *Engliſh* letters pate and the title was the name of a place in *Ireland*, he would certai have been an *Engliſh*, not an *Iriſh* peer; and ſo it is now; for conqueſt of *Ireland* being an external accident, cannot alter conſtruction of patents and laws of *England*. The intendme that *Banbury* is out of the realm, is a foreign conſtruction: thou the king by *Engliſh* patent may create an earl of *Ireland*, yet t muſt be by expreſs words, becauſe it is a ſpecial act of prerogati for the great ſeal extends into *Ireland*, becauſe ſubordinate, ſubject by conqueſt; and the king's patents may be conſtrued acts of parliament, which extend not to *Ireland* if it be not ſpe ally named. *Seld. Tit. Hon.* 696. In the creation of nobles, not mentioned in what county the place is from whence they t their titles; which would be, if neceſſary that the place ſhould in *England*. Many *Engliſh* earls have titles from foreign pa *Sir Richard Woodville* was created *Earl of Rivers*: There an antient family called *Rivers*, that were *Earls of Devon* in *E Edward the Third*'s time, but there is no place to be found of name. Since 21. *Hen.* 8. patents of earls have had theſe additi words in them, that the patentee ſhall have *ſedem et vocem in p liament. inter comites Angl.* but the *Earl of Rivers*'s patent has ſuch words, or any other than are here pleaded by the defend

[60]

An earl need not aver that he is *unus parium Anglia*.

As to the defendant's not averring that he was *unus parium*, an earl in pleading need not make that averment; and 6. *Co.* and 8. *Hen.* 6. 9. in which that is made, is in caſe of baron o Baron indeed is an addition; if created by writ, it is no part of

Baron created by patent is part of the name; not if by writ.

name; if created by patent, it is. But a baron muſt not plea be called only *dominus*, but muſt ſay *parliamenti*; for one may called *dominus*, as an earl's ſon, and not be a lord of parliam Beſides, the defendant here does not claim a privilege as a p but pleads a miſnomer in the omiſſion of his title, which being gi him by letters patent is part of his name. Being a peer or lor parliament does not exempt him from being indicted here, and th

3. Inſt. 26.

re not material in this caſe. He that claims benefit of trial by ers muſt ſhew himſelf to be *unus parium, &c.*; but * this plea no more than if a knight had pleaded miſnomer in not being named knight. As to producing a writ to certify the peerage, it is to : anſwered, that there be ſome barons, and one earl, ſo antient, at their commencement cannot be ſhewn; ſuch can no way in- tle themſelves but by preſcription; and ſuch ought to produce a rit that ſome of their anceſtors ſat in parliament, and then derive title by deſcent from ſuch anceſtor to him that pleads it. In the . *Co.* 15. *Calvin's Caſe*, if compared with other books, is no more an that it ſhall be teſtified by record of parliament if the party or is anceſtors ſat as peers in parliament; which proves, that if any nceſtor appears on record to have been a peer, as here it doth by etters patent, it is ſufficient, and that title may be derived by mat- er of fact, as by deſcent. The writ intended is in nature of a writ f privilege; if founded on record, it teſtifies matter of record, and s concluſive; but if it certifies matter of fact, as it muſt do in ſuch caſe as this, it is traverſable, notwithſtanding ſuch certificate, and herefore ſignifies nothing; and therefore if the plea ſhould con- :lude, *et hoc paratus eſt verificare per recordum*, it would be ill, for he only matter traverſable is matter of fact. A writ to certify their deſcents would be vain; for where a writ certifies a thing which lies as much in the conuſance of the court to whom it is certified as of the court which certified it, it is needleſs. Upon pleading creation of peerage by writ, ſuch writs are brought for expedition, not neceſſity, but to prevent the delay which would be on a traverſe and taking iſſue on the ſitting of the parliament, which traverſe cannot be after ſuch certificate. So if the defendant, in his plea, ſhew the letters patent that created the honour, they cannot be traverſed, or iſſue taken on earl or not earl, except the patent be denied, which cannot be, becauſe it is produced; and theſe patents are not like thoſe of lands, where *non conceſſit* may be maintained by matter foreign; as that the lands do not appear under the deſcription in the letters patent; or that there are divers lands or tenements of the ſame name. As to the replication, that does not conclude the defendant: Firſt, Becauſe the order is no judgment of parliament; ſecondly, the plea pending does not concern the title of his earldom; thirdly, there is nothing in this order to bar him from enjoying the right and title of earl. Firſt, It is no judg- ment of parliament. That court conſiſts of king, lords, and com- * mons. *Cromp. Juriſd. of Courts*, 1. 4. *Inſt.* 1. *Dyer*, 60. * [62]
The authority of the houſe of lords is legiſlative and judicial. The judicial power is actually executed and adminiſtered by the lords, but is legally and virtually in the king; if not, in the whole parliament. All judicial proceedings are either *coram rege in parliamento*, or *placita de parliamento*, or *coram rege et ejus concilio in parliamento*. *Ryly's Pl. Parl. f.* 1. 114. 145. 157. 63 66. 267. 292. Writs of error are *coram nobis ad præſens parliamentum*: the judgment *per cur. parliamenti*, and not *per dominos ſpirituales et temporales*; and though the journals are by the lords ſpiritual and

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3. Inſt. 30.

9. Co. 31. a. 49. a.

Ante, 57.

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and temporal, yet they are only as notes and warrants for the clerk to make up the rolls by. *Hob.* 110. All courts mention the king either to give them juriſdiction, or as party to the judgment, for all derive their juriſdiction from him. The lords then having double capacity to act judicially, as the court of parliament, or to act as a particular houſe, we cannot know in which capacity they act but by the ſtile of their orders; and if they act by the ſtile of the lords ſpiritual and temporal, they act as a diſtinct houſe, excluſive of the other eſtates. In the court of king's bench, which is holden *coram rege*, the judgment is not entered to be given *per juſticiarios*, though they actually give it, but it is ſaid *per cur. domini regis*; and a judgment given in another form or ſtile would be void; and though the Judges give it, yet it would not be a judgment of the Court. This is an original cauſe, and therefore ought not to come at the firſt ſtep to the laſt reſort: and the reaſon is, becauſe generally original cauſes are mixed with fact as well as law, which is below their dignity to determine, becauſe it concerns only individual caſes, and are not general points of law, which reach to all cauſes within the like reaſon. If error in fact happen here, a writ of error lies not thereof in parliament, but here before ourſelves; and this is out of neceſſity, becauſe the parliament cannot try the fact: but out of other courts, inferior to the king's bench, error doth lie into the king's bench upon errors in fact. If the houſe of lords had original conuſance, the party would loſe the benefit of an appeal; and to have a man's right finally determined by the firſt judgment is not conſonant to law: and therefore a writ of error brought into the houſe of lords of a judgment in the common pleas or exchequer, *per ſaltum* is void. 4. *Inſt.* 21. So was the *Earl of Macclesfield's Caſe*. The * proper remedy for a title of peerage is by common law, by petition of right to the king, which he indorſes *ſoit droit fait*, &c. and delivers it to the Chancellor where there is occaſion; and in ſuch petition the party ought to ſet forth his right and title, as the defendant doth here in his plea; and when indorſed and ſent into chancery, a commiſſion iſſues out to enquire the truth of his ſuggeſtion; and if the inquiſition find it true, then the attorney-general may confeſs it or traverſe it; and if upon the traverſe an iſſue is joined, the record muſt be ſent into the king's bench, and there tried, and judgment given. *Stamf. Prærog.* 72, 73 And theſe proceedings are ſuch as are in other caſes, where the ſubject is aggrieved by the king or thoſe employed under him, whether it concern lands, perſonal things, &c. As to the precedents cited; my *Lord Delaware's Caſe* was referred to the lords, not by way of judicature, but for their opinions and advice; and if the lords had then conceived they had a judicial juriſdiction it is to be preſumed they would not have waived it, and ſubmitted to have taken it upon them by way of reference; and the queen did not in that caſe proceed judicially, by indorſement of the petition to the chancery; but the caſe concerning the lords, ſhe took their advice, and compriſed it in an extrajudicial and amicable way; and ſo was the *Earl of Oxford's Caſe* by conſent, and not by judgment

* [63]

the houſe of lords; and *Lord Abergavenny's Caſe* is recited to by way of reference: the *Lord Mountjoy's Caſe* was concerning ecedency, and ſo within their conuſance as a breach of privilege, d was a point neceſſary to be ſettled before he was introduced; t the inheritance of the dignity and title is not in queſtion: the rd *Preſton's Caſe* was, that he gave out in ſpeeches that he as an *Engliſh* peer, which aſſumption was a breach of privilege; d when he was demanded to ſhew the truth of his pretence, he oduced a patent, which appeared void, as if it had been under the *rench* king's ſeal; and it was directed that he ſhould be proſecuted a criminal. Secondly, There is no plea pending concerning the ght of the earldom; the defendant's petition does not pray to be mitted to the earldom, but ſuppoſes him in poſſeſſion of it, and o deſires to be tried by his peers. The lords on this could not ad-dge that he ſhould enjoy the earldom, becauſe he does not demand pray that; no more can they that he ſhould loſe it. Every judg-nt muſt be *pro* or *con.* anſwerable to * the demand of the plain-f, and adequate and proportionable to it. Thirdly, This order pears to be no judgment, but an opinion: it is no excluſion from enjoyment of the office or honour, which ought to be in every lgment; and it is not ſufficient that it declares the right: as in *uo warranto*, *videtur Cur.* that the defendant hath no title to franchiſe, is not a judgment, but a foundation of the judgment ly; but the judgment ought to be *quòd amoveatur*, *&c.* for every lgment ought to be ſuch as it may be executed. So in *Levett d Hall's Caſe*, 2. *Cro.* 284. judgment againſt the plaintiff, with-t *nil capiat per billam*, is not good. The judgment here is ſuch cannot be executed. The diſmiſſion of a petition is the form of udgment in a court of equity, but not in a court of law. In a lgment, it is not ſufficient that the party has no title, but it muſt expreſsly adjudged that he hath none. As to the *ſecundum legem ſuetud. parliamenti*, that is added by the king's council only *in rorem. Lex parliamenti* is *lex terræ*; and if a queſtion con-ming it doth ariſe in a cauſe of which the king's bench has proper nuſance, the king's bench may adjudge of it as the ſpiritual courts of temporal judgments, as patents, deeds, &c. for the conuſance the principal draws to it the conuſance of the acceſſories and in-lents. *Dyer*, 60. And this holds in caſe of privilege of parlia-ent; as in *Sir John Benyon's Caſe*, *Trin.* 14. *Car.* 2 in the mmon pleas, where filing an original againſt a ſitting member as adjudged no breach of privilege. So a writ of error in parlia-ent, if a Term intervene after the *teſte* and before the return, th been adjudged to be no *ſuperſedeas* of execution. So on a *beas corpus*, the king's bench hath determined what continuance commitment by parliament ſhall have. That can be no law or ſtom of parliament which is not grounded on precedents; and re is none that ever any man's inheritance was determined *legem et conſuetudinem parliamenti.* It is no new thing for our mmon-law courts to examine matters of this nature, which con-rm proceedings in parliament; we do but follow the examples of

THE KING AND QUEEN *againſt* KNOWLES.

* [64]

Filing an original againſt a ſitting member has been judged no breach of privilege.

THE KING AND QUEEN *againſt* KNOWLES.

our predeceſſors. In the thirty-eighth year of *Edward the Third (a)*, the biſhop certified to this court that the father and mother were married, but that the party was born in adultery; the lords ſent a writ to the Judges, and ordered them to judge on the ſpecial matter; but the Judges did not obey. In *Stanton's Caſe (b)*, * the lords commanded the court of common pleas to give a judgment; the Chief Juſtice refuſed; afterwards, in his abſence, the others complied, and gave judgment; the king's bench afterwards examined the proceedings of the lords, and adjudged them void; as appears 15. *Edw.* 3. 1, 2. in the *Oxford* Library. We are not to delay the juſtice of the land, and the law of it is our rule; and for theſe reaſons let the indictment be quaſhed.

* [65]

But the defendant remained in cuſtody on a ſecond indictment, wherein he was named *Earl of Banbury*.

(*a*) 38. *Edw.* 3. pl. 14. (*b*) 15. *Edw.* 3. Fitz. Abrid. "Vouch," 109.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Edward Ward, *Knt. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

Sutton *againſt* Sparrow.

Caſe 118.

APPEAL OF MURDER *de morte viri.* It was carried down to be tried at *niſi prius* in *Yorkſhire* laſt aſſizes, where both parties appeared; but the appellant did not put in record to try the iſſue.

Appeal *de morte viri* carried down to be tried by *niſi prius*; appellant did not put in the record; held neither nonſuit nor diſcontinuance, but appellant to pay coſts.

S. C. Holt, 255.

And now THE COUNSEL *for the defendant* moved, that the peal being not tried, it was either a nonſuit or a diſcontinuance.

But HOLT, *Chief Juſtice*, was of opinion, that it was neither; t ordered the appellant to pay coſts for not going on to trial.

IT WAS THEN MOVED, that the appellant might be called in; hich was done: her attorney appeared for her; which was held ficient, the appeal being brought by a woman.

The attorney appearing for the appellant good, being a *feme.*

Croſby's Caſe.

* [66]

Caſe 119.

CROSBY was brought to the Bar by a *habeas corpus* the laſt day of Term.

A perſon indicted above two Terms for

[illegible] is afreſh indicted for the ſame ſpecies of treaſon, but differently laid; THE COURT inclined he [illegible] be bailed, but gave no opinion, but bailed him by their diſcretionary power. S. C. poſt. 72.

Crosby's Case.

It was prayed *on his behalf*, that he might be diſcharged or bailed, having entered his prayer the firſt day of *Trinity Term* laſt, and was indicted the laſt Term; and afterwards this Term again was indicted for the ſame ſpecies of treaſon, but never tried on either of them. The Counſel alledged, that the end of the ſtatute was, that no perſon ſhould be above two Terms under the ſame accuſation; and if a ſecond indictment found ſhould prevent his being ſet at liberty, at that rate, freſh indictments being found every Term, he will never be diſcharged, and ſo the ſtatute would be eluded.

The Attorney and Solicitor General agreed, if the caſe had ſtood ſingly on the firſt indictment, he ought to be bailed; but there is another indictment for another treaſon: the firſt was for a foreign treaſon, in conſpiring the death of the king, and the overt-act was laid in *Ireland*; but the ſecond is for a treaſon in *England*.

Holt, *Chief Juſtice*. The commitment and both the indictments are for the ſame ſpecies of treaſon, though the overt-acts are differently laid; but the laſt indictment agrees exactly with the commitment. Beſides, the prayer relates to the commitment, ſo that the party ought to be tried for the treaſon for which he is committed within two Terms; and the deſign of the act was to prevent a man's lying under an accuſation for treaſon, &c. above two Terms.

Giles Eyre, *Juſtice, &c.*

Poſtea, Hill. 8. *Will.* 3. The King v. Comit. Ailesbury.

But both declared they would give no opinion in the caſe, but bailed him by virtue of their diſcretionary power.

HILARY TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Edward Ward, *Knt. Attorney General.*
Sir Thomas Trevor, *Knt. Solicitor General.*

* The King *againſt* Larwood.

Caſe 120.

INFORMATION againſt the defendant, ſetting forth, that *King Henry the Fourth* had granted to the city of *Norwich* to be a county; and that the citizens and community ſhould chuſe yearly a mayor and two ſheriffs; and that *King Charles the Second* confirmed the charter of *Henry the Fourth, et ulterius conceſſit*, that the mayor, ſheriffs, and aldermen, ſhould chuſe one ſheriff, and the citizens and commonalty the other; that the defendant, a freeman of *Norwich*, was elected ſheriff by the mayor, &c. according to the charter of *King Charles the Second*, and upon notice of it *non præſtitit ſacramentum officii, nec officium ſuper ſe aſſumpſit.*

A perſon may excuſe himſelf for not executing the office of ſheriff, on account of his not having taken the ſacrament.

S.C. 1. Salk. 168.
S. C. 3. Salk. 134.
S. C. 4. Mod. 270.
S. C. Skin. 574.
S.C. Carth. 306.
S. C. Holt, 505.
S.C. Comb. 315.
S. C. 2. Vent. 248.
S.C. 1. Ld. Ray. 29.
6. Com. Dig. "Viſcount" (A. 2.).
4. Bac. Abr. 125. 167. 431.
Stra. 1193.
Ld. Ray. 1354.

The defendant pleads in bar, *quòd non cepiſſet ſacramentum cœnæ Domini hic infra annum*, and therefore by the ſtatute of 13. *Car.* 2. c. 1. *ipſe eſt incapax, et electio vacua, et inde notitiam dedit*; and avers, that *ad generalem ſeſſionem* Norwici *cepit ſacram. ſecund.* 1. *Will. & Mary, et ſubſcripſit declarationem ſecund.* 30. *Car.* 2. and is an inhabitant of *Norwich.*

Replication, that the defendant *ut membrum Eccleſiæ Anglicanæ quolibet anno ſacramentum cœnæ Dominicæ cepiſſe debuiſſet, et per defectum ſuum proprium excuſari non debet.*

THE KING *against* LARWOOD.

Rejoinder, *proteſtando quòd non debuit, &c.* he pleads the Act of Indulgence, 1. *Will. & Mary*, and avers *quòd eſt proteſtans diſſentiens, &c.* and repeats the averments in the bar.

And SIR SAM. ASHTREE *pro rege* demurs.

After ſeveral arguments at the Bar, it was this Term argued by the Court.

THE FIRST EXCEPTION was taken to the information, that it did not appear by it that the defendant was lawfully choſen ſheriff, * [68] for *King Henry the Fourth* veſted the election in all the * commonalty and citizens, and it is an intereſt veſted in them, which cannot be deveſted but by forfeiture or ſurrender. The king by his letters patent cannot do this wrong; and particularly patents of confirmation cannot make this alteration.

But it was reſolved by HOLT, *Chief Juſtice*, and GREGORY, *Juſtice* (*contra* SAMUEL EYRE, *Juſtice*, who held, the acceptance of the ſecond charter by the commonalty did not ſufficiently appear), that the firſt charter had veſted the election in the populace, and could not be deveſted by the ſecond, and placed in a ſelect number, without the aſſent of all, but by ſuch an aſſent it might; and that here had appeared a ſufficient acceptance, by the election alledged in the information, which is an execution of the conſtitution in the ſecond charter; and the defendant in pleading does not diſpute his election, but inſiſts on his incapacity.

THE SECOND EXCEPTION was taken to the rejoinder, that the ſtatute of Indulgence ought to have been pleaded in bar, and that the pleading it in rejoinder was a departure. The defendant in his rejoinder may make good and fortify the matter in his bar, if it be *ad idem*; as if a ſtatute be pleaded, and he replies that it was repealed, the defendant may in rejoinder ſhew it revived; but here it does not fortify, but is new and not *ad idem*; for in the bar he inſiſts, that the election is void by the ſtatute 13. *Car.* 2. and in the rejoinder, though it is not void, which contradicts the bar, yet the Act of Indulgence excuſes it; and this was admitted on the defendant's part;

And RESOLVED BY THE COURT to be a departure.

THE THIRD EXCEPTION. As to the effect of the Act of Indulgence, whether non-conformity is an offence ſince the Act of Toleration,

HOLT, *Chief Juſtice*, and GILES EYRE, *Juſtice*, would not give any opinion, becauſe it was out of the caſe.

But SAMUEL EYRE, *Juſtice*, declared his opinion, that the ſtatute did excuſe the defendant, though otherwiſe liable.

THE FOURTH EXCEPTION. For the defendant it was urged that the ſtatute of Indulgence was a general law, which need not be pleaded; and the defendant hath ſufficiently ſhewed himſelf to be within the qualifications of it by the bar.

But

THE KING *againſt* LARWOOD.

But PER CURIAM, it was reſolved, the defendant could not take advantage of the ſtatute without pleading it.

FIRST, Becauſe it is a private ſtatute *(a)*, and extends only to proteſtant diſſenters, of whom no act before has taken notice.

SECONDLY, Be it a private act or not, the Court cannot take notice whether the defendant be within it or not, if he do not ſhew himſelf to be within it, *viz.* not only that he is a proteſtant diſſenter, but alſo that he goes to religious meetings, &c.

THE PRINCIPAL POINT was the matter in bar, whether the * omiſſion of the ſacrament excuſed the executing of the office upon the ſtatute of 13. *Car.* 2. * [69]

And it was reſolved PER CURIAM,

FIRST, That the king can command the ſervice of his ſubject, and none can diſable himſelf.

Per HOLT, *Chief Juſtice*, and GILES EYRE, *Juſtice*, reſolved, that the ſtatute was not made to deprive the king of the ſervice of his ſubjects diſſenting, but that they ought to qualify themſelves.

On ſuit on the ſtatute of 23. *Eliz.* for not going to church, excommunication is no plea.

GILES EYRE, *Juſtice*, reſembled it to the caſe of 23. *Eliz.* which requires all people to come to church; and held, that an excommunication, which diſables a man to come to the congregation, is no plea, becauſe it is in his own default.

And HOLT, *Chief Juſtice*, ſaid, this caſe ſhall not be intended better than the defendant has ſhewed it to be; and therefore he ſhall not be ſuppoſed for any ſcruple of conſcience, but out of a general neglect of all things ſacred. That by common intendment all the ſubjects of *England* are Chriſtians, and of the National Church; and by the antient canon law, received here as part of the common law, every one ought to receive the ſacrament once a year at leaſt; and this is alſo required by the rubric, which is confirmed by act of parliament, and not doing it is an offence; and this offence, being the neglect and default of the defendant, ſhall not excuſe him from his duty and ſervice to which he is liable by the conſtitution of the government; and this plea is directly to contradict a maxim of law, that no one ſhall be admitted to ſtultify or diſable himſelf. And he ſaid, that in *London*, and other places, ſince this ſtatute, diſſenters have been elected and ſubmitted to a fine, and never diſputed it.

Vide Hard. 406. 2. Rol. Rep. 438. Brown's Caſe.

But SAMUEL EYRE, *Juſtice*, differed, and ſaid, *nemo debet bis puniri pro eodem delicto*, which here the defendant ſhould be puniſhed on this information for not qualifying. SECONDLY, He ſhall be puniſhed for the ſame omiſſion of the ſacrament by eccleſiaſtical cenſures. THIRDLY, He ſhall be puniſhed for accepting the office without a qualification.

Judgment was given for the plaintiff *(b)*.

(a) By 19. *Geo.* 3. c. 44. it is declared to be a public ſtatute.

(b) But ſee the caſe of Harriſon *v.* Evans, in which it was ſolemnly determined, that he may plead the ſtatute 13. *Car.* 2. and aver that he is a proteſtant diſſenter within the Toleration Act, 1. & 2 *Will. & Mary*, c. 18. and had not received the ſacrament. 2 Burn's E. L. 168. Cowp. 393. 535. 6. Brown's Caſes in Parl. 181.

Caſe 121.

Walker *againſt* Walker.

Indebitatus aſſumpſit will not lie for money won at play.

INDEBITATUS ASSUMPSIT, among other things, for money won at play; and a general verdict.

* [70]

IT WAS MOVED *in arreſt of judgment*, that *indebitatus aſſumpſit* does not lie; for though the caſt of a die may alter the property, for where the money is ſtaked it is given on a condition precedent, *viz.* the caſt of the die, yet this is not a conſideration to raiſe a debt or promiſe, but it is only a promiſe againſt a promiſe, for which the ſole remedy is a ſpecial action on the caſe * upon the mutual promiſe.

S. C. poſt 258. S. C. 5. Mod. 13. S. C. Comb. 303 S. C. Holt, 323. 6. Mod. 128. 1. Salk. 22. 125. Skin. 196. 2. Bac. Abr. 15. 620. Cowp. 37. 1. Term Rep. 616.

And to that opinion THE COURT ſtrongly inclined, although the caſe of *Eccleſton v. Lewin* was mentioned *(a)*, where it was held a good conſideration: and ACHERLY cited *Sherbourn v. Worlich* *(b)* to be ruled PER CURIAM, that a general *indebitatus aſſumpſit* lay for money won at play for the hazard; and *Bret v. Firebraſſe* *(c)* upon the ſame point in trover: and THE CHIEF JUSTICE cited the caſe of *Brown v. Ludlow* *(d)*, in HALE's time, where it was adjudged, that an *indebitatus aſſumpſit* does not lie againſt an acceptor of a bill of exchange, unleſs the money was delivered to him to pay over; and that in that caſe, if there were effects of the drawer in the hands of the acceptor it was not material; for it was after verdict, where want of averment of effects in the hand of the acceptor had been aided by intendment, if neceſſary: but becauſe the point in queſtion was depending in the exchequer-chamber, in the caſe of *Jackſon v. Cottgrave* *(e)*, unreſolved, which was for money won on a wager, judgment was ſtayed here; and afterwards by the exchequer-chamber, by them, and on adviſement with the Judges of the king's bench, it was held, that an *indebitatus aſſumpſit* would not lie; and the caſe of *Jackſon v. Cottgrave* was reverſed, and ſo in this judgment never entered *(f)*.

Poſtea, Mich. 7. *Will.* 3. Anonymous.

SIR BARTHOLOMEW SHOWER cited a caſe where *indebitatus aſſumpſit* lay for the winner againſt him that held ſtakes; *quod* HOLT, *Chief Juſtice, conceſſit.*

(a) Eggleton *v.* Lewin, entered Hil. 33. & 34. *Car.* 2. before PEMBERTON, *Chief Juſtice*, and afterwards affirmed in the exchequer-chamber, 3. Lev. 118.

(b) In the common pleas, in Trinity Term, in the ſecond year of *William and Mary.*

(c)

(d) Brown *v.* Loudon, Hard. 485. 2. Keb. 758. 822. 1. Lev. 298. 1. Mod. 285. 1. Vent. 152. 1. Freem. 14.

(e) Jackſon *v.* Colegrave, Michaelmas Term, 3. *Will. & Mary*, in the King's bench, Roll 610. Carth. 338.

(f) See S. C. poſt. 258.

EASTE

EASTER TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

*Williams and Others, Executors of Mellys, *againſt* Cary. Caſe 122.

ACTION UPON THE CASE for a falſe return; whereon they declared, that whereas the plaintiff's teſtator had recovered a judgment againſt *J. S.* for one hundred and forty pounds, and had ſued out execution by *fieri facias* on this judgment, directed to the defendant, ſheriff of *Wilts*; by virtue of which *fieri facias* the defendant did levy goods to the value of one hundred and one pounds, but made a return, that he had levied nineteen pounds of the goods of the ſaid *J. S.* and that he had taken other goods to the value of forty pounds, which remained in his hands *pro defect. emptarum*; and that the ſaid *J. S.* had *nulla alia ſeu plura bona*, whereas the defendant did levy goods to the value of one hundred and one pounds, *per quod actionem accrevit.*

An executor may bring action on the caſe for a falſe return to a *fi. fa.* in his teſtator's time.

S. C. 4. Mod. 403.
S. C. Salk. 12.
S. C. 3. Salk. 149.
S. C. Comb. 264. 322.
S. C. Holt, 307.
S. C. 1. Ld Ray. 40.
6. Com Dig. "Return" (F. 2.).
1. Bac. Abr. 166.

IT WAS MOVED *in arreſt of judgment*, that no action lay, becauſe it was only a perſonal tort to the teſtator, and ſo not within the equity of the ſtatute *de bonis teſt. aſportat in vitâ.* 4. *Edw.* 3. c. 7. cited. 1. *Roll. Abr.* 913. and *Cro. Car.* 297.

AND IT WAS ADJUDGED, that the action well lay for the executor, being within the equity of the ſtatute.

And

WILLIAMS AND OTHERS, EXECUTORS OF MELLYS, *againſt* CARY.

HOLT, *Chief Juſtice.* An action upon the caſe lies for an executor upon this ſtatute, for an eſcape out of execution in the teſtator's time; though it is a doubt in the Books, whether ſuch an action lies for an executor, in caſe of an eſcape upon meſne proceſs in the teſtator's time (*a*): that if the ſheriff take goods in execution on a *fieri facias*, they are now in the ſheriff's hands for the plaintiff's uſe, and ſo are as part of the plaintiff's perſonal eſtate; and if the ſheriff afterwards return *nulla bona*, the plaintiff cannot have any benefit of the goods, * but the defendant in the *fieri facias* will have good title to the goods by the eſtoppel occaſioned by the return; and the plaintiff is wronged as to that which is part of his perſonal eſtate. But on eſcape of the meſne proceſs there is only the loſs of the proceſs (*b*).

* [72]

(*a*) Maſon *v.* Dixon, 1. Jones, 142.
(*b*) Judgment was given for the plaintiff, S. C. 4. Mod. 404.

Caſe 123.

The King *againſt* Croſby.

Whether infamy ariſes from the crime or puniſhment. *Quære.*

CROSBY was tried for high treaſon; and *Aaron Smith* was produced as a witneſs. *Smith* had ſtood in THE PILLORY for giving inſtructions to *Stephen Colledge.*

S. C. 5. Mod. 15.
S. C. Skin. 578.
S. C. Salk. 689.
S. C. Holt, 753.
3. Inſt. 33, 34.
1. Hale, 304.
Gilb. L. E. 140.

It was objected, that he was not a good witneſs.

SAMUEL EYRE, *Juſtice*, ſaid, his opinion had always been, that the diſability follows the infamy of the fact, not of the puniſhment; but waiving that, *Smith* was a good witneſs by the late act of pardon (*a*).

HOLT, *Chief Juſtice.* Though the pardon does not take away the former diſability, as a reverſal of a judgment does, yet it gives him an ability *de novo* (*b*). But he intimated his opinion to be, that the diſability followed the infamy of the puniſhment (*c*).

Compariſon of hands no foundation for attainder, but may be uſed as circumſtantial evidence.

At this trial, ſeveral treaſonable papers were produced, which they ſwore they believed to be the hand-writing of the priſoner.

And on this a queſtion aroſe, Whether compariſon of hands were ſufficient?

PER CURIAM. It is not ſufficient for the original foundation of an attainder, but may be well uſed as a circumſtantial and confirming evidence, if the fact be otherwiſe fully proved; as in my *Lord Preſton's Caſe* (*d*), his attempting to go with them into *France*, and principally where they were found on his perſon; but

(*a*) See Rex *v.* Warden of the Fleet, poſt. 340.
(*b*) See the caſe of Cuddington *v.* Wilkins, Hob. 67. 82. and Reilley's Caſe, Caſes in Cro. Law, 2d edit. 362.
(*c*) It is now ſettled, that it is the infamy of the crime, and not the nature or the mode of puniſhment, that deſtroys the competency of the offender as a witneſs, Pendock *v.* Mackender, 2. Wilſon, 18 —See alſo Rex *v.* Davis, 5. Mod. 74 Walker *v.* Kearney, 2. Stra. 114 Carter's Caſe, 2. Salk. 461. Rex Edwards, 4. Term Rep. 440.—But by 31. *Geo.* 3. c. 35. no perſon ſhall be incompetent witneſs by reaſon of a conviction of petty larceny.
(*d*) 4. State Trials, 440 447.

her

ce they were found elſewhere, to convict on a ſimilitude was to run into the error of *Colonel Sidney's Caſe* (*a*). THE KING *againſt* CROSBY.

State Trials, 802.—But ſee ſubject, Francia's Caſe, 6. St. Layer's Caſe, 6. St. Tr. 275, Henzey's Caſe, 1. Burr. 644. Scarlet, Eſpinaſſ. N. P. 14. Rivet *v.* Braham, 4. Term Rep. 497. 4. Hawk. P. C. 7th edit. ch. 46. ſ. 52. to 57. Foſter's Diſcourſe of High Treaſon, 198. 218.

Anonymous. Caſe 124.

T, *Chief Juſtice.* One muſt plead *tout temps priſt* always ore imparlance (*a*). *Tout temps pris.*

(*a*) Anonymous, ante, 8.

Anonymous. Caſe 125.

T, *Chief Juſtice.* If you bring debt, or annuity, and part he quarter be paid, you muſt acknowledge ſatisfaction for l declare for the reſidue (*a*). Where the debt is entire, ſatisfaction muſt be acknowledged for the reſidue.

Johnſton *v.* Baynes, poſt. 84. Hawkins *v.* Gardner, poſt. 213.

TRINITY

TRINITY TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 126.

* Anonymous.

Arreſt.
See the caſe of Lee *v.* Ganſell, Cowp. 1.

HOLT, *Chief Juſtice.* If a bailiff find an outward door open, he may break open all the inner doors to come at the party whom he hath a warrant to arreſt.

Caſe 127.

Sir John Dalſton *againſt* Eyenſton.

Tort and *contract* cannot be joined.
S.C. 1. Salk. 10. S.C. 5. Mod. 90. S.C. Comb. 333. S. C. 3. Salk. 204. S.C. 1. Ld. Ray. 58. S. C. 3. Ld. Ray. 74. 99.

IT WAS MOVED in arreſt of judgment, that two ſeveral actions of different natures were joined together, *videlicet*, an action on the cuſtom againſt a carrier, and trover, wherein the "*not guilty*" is the iſſue to both, yet muſt be ſeparately laid, as in *Sid.* 244.

And IT WAS ADJUDGED in *Michaelmas Term* after, that an action on *a tort* and on *a contract* cannot be laid together.

And the judgment was arreſted (*a*).

Poſtea, Hill. 9. *Will.* 3. Courtney *v.* Collet, 1. Vent. 365, 366. 3. Lev. 115.

(*a*) But it is now ſettled, that an action againſt a common carrier on the cuſtom of the realm and an action of trover may be joined in the ſame declaration, Dickſon *v.* Clifton, 2. Wilſ. 319. Bedford *v.* Alcock, 1. Wilſ. 252. Maſt *v.* Goodſon, 2. Bl. Rep. 848. and Brown *v.* Dixon, 1. Term Rep. 274.

Anonymous.

Anonymous. Caſe 128.

JRIAM. A double plea is no exception on a general rer, but it muſt be ſpecially demurred to. 1. Saund. 337.

Anonymous. Caſe 129.

, *Chief Juſtice.* If a bailiff having a warrant from the F on a *capias* ſend another in his room to arreſt the per- arreſt is illegal.

A bailiff cannot depute a perſon to make an arreſt.

Anonymous. Caſe 130.

JRIAM. If a man be in cuſtody of the marſhal on a *'it ſe*, you may charge him on the *reddidit ſe* in execution ıarſhal, without making the marſhal acknowledge him in e in his cuſtody: but if he be in execution, you ſhall not n till acknowledged.

How a priſoner on meſne proceſs may be charged in execution.

Anonymous. Caſe 131.

', *Chief Juſtice.* A rent may be reſerved on words of nant; but where there is a rent reſerved, and a covenant ther money in the ſame deed, debt will not lie for * the if I demiſe twenty acres, reſerving twenty pounds a-year, :r agree with him in the ſame deed, that for as many acres l plow up he ſhall give ten ſhillings more for each *per* this laſt ſum is no rent, and an action of debt will not lie

A rent may be reſerved on words of covenant.

* [74]

Kirkham *againſt* Wheely. Caſe 132.

ON QUI TAM. The defendant pleaded, that he was an rney of the common pleas, and that all attornies of the pleas have not been ſued anywhere elſe than in the com- s. The plaintiff demurred.

In an action *qui tam* the defendant may plead privilege in the negative.

: was ſaid, that he ſhould not have pleaded it in the nega- that he ſhould have made *a full defence*, whereas he only *enit et dicit*; and this being for THE KING, as well as for , he may ſue in what court he pleaſes.

S.C. 1. Ld. Ray. 27. S. C. 1. Salk. 30. S. C. 2. Salk. 543. S C. 3. Salk. 282. S. C. Comb. 319.

JURIAM. Pleading in the negative is well enough, be- ere is juriſdiction enough given thereby to the common If indeed it had been an exception iſſuable in fact, the could not have been ſo well, becauſe an affirmative ought forth to make a traverſe; but here the matter is not tra- not being triable *per pais*, but a matter in law.

NDLY, "*venit et dicit*" is a ſufficient defence, according *lon.* 6. 13. 19.

THIRDLY,

KIRKHAM *againſt* WHEELY.

THIRDLY, The king may ſue in any court, but an informer cannot; and a proſecutor *qui tam* has been looked on as no other than common informers (*a*); for in caſe the plaintiff ſhould die, there is an end of the ſuit, and the king is intitled to a recovery.

But for another exception it was afterwards adjudged inſufficient.

Quære, what it was.

(*a*) See Lutw. 196. 3. Lev. 398. Cowp. 322. 366. 744. and the note to Mr. Evans's edition of Salkeld, page 30. where all the caſes on this ſubject are collected.

Caſe 133. The King *againſt* Bythell.

A good judgment returned, though the return not good; ſo would not diſcharge him, but put him to his writ of error.

BYTHELL was indicted, at the ſeſſions of *oyer and terminer* and gaol-delivery, for buying and ſelling broad money, and convicted, and fined one hundred pounds; and by *habeas corpus*, directed to the keeper of *Newgate*, was brought to the king's bench; and this return was made, that he was committed to him, keeper of *Newgate*, by order of the court of ſeſſions, "*cujus tenor, &c.* "WILL. BYTHELL *convict. fuit, &c. ideo conſiderat. eſt per Cur.* "*&c. et quod ibid.* SCILICET, in the cuſtody of the keeper of "*Newgate, in gaolâ ſub ſalvâ cuſtodiâ quouſq. finem perſoluat.*"

* [75]

S.C. 5 Mod. 19.
S. C. Salk. 348.
S. C. Holt, 145.
S. C. 1. Ld. Ray. 47.
1. Salk. 149.
1. Mod. 118. 184.
Stiles, 147.
Stra. 915.
4. Com. Dig. "Habeas Corpus" (E. 2).
3. Bac. Abr. 15.
2. Hale, 584.
2. Hale, 144.
2 Term Rep. 255.

And it was moved he might * be diſcharged or bailed, becauſe no legal commitment appears by the return, for the word "*committitur*" is not there; and if the form of the commitment were legal, yet here is no legal officer to whom he is committed, for the commitment is "to the gaol or gaoler of *Newgate*," whereas it ought to have been to the ſheriff, for he is the immediate officer to the court.

But PER CURIAM, He ſhall be remanded.

SAMUEL EYRE, *Juſtice*. The return is not good; but here is enough to remand him, for there is a good judgment returned; and if by an informal return, where judgment appears good, we ſhould diſcharge him, we ſhould at that rate rid all the gaols in *England*; and he cited *March*, 52. there was a *habeas corpus* "to "the porter of *Ludlow*;" and on the return, though it appeared the damages given were beyond the inſtructions of the Council of the *Marches*, by whom judgment was given, yet becauſe a fine was ſet on them to the king, and that remained unpaid, the Court remanded them; and ſo here, a fine being ſet, the king would loſe by this diſcharge.

Poſtea, Hil. 8 *Will.* 3. The King *v.* Clerk.

HOLT, *Chief Juſtice*. The commitment is not ſo regular as it ought to be, for he ſhould have been committed "to the *ſheriff*," and by the very word "*committitur*;" but yet it appears he is committed by a court that has juriſdiction, for a very good cauſe. Now though the gaoler be not a proper officer, by law, to have the commitment of him formally, yet actually he is ſo, and the law takes notice of him. If he ſuffer a voluntary eſcape of a criminal, it is

criminal

l in him, and not in the ſheriff; and all commitments of y juſtices of peace are to the gaolers: but when the party o be tried, he is always ſuppoſed to be in cuſtody of the ſhe- nd it has been a queſtion, If the gaoler ſuffer an eſcape in a ion, whether he is not liable to the party's action of debt e as well as the ſheriff? *Hard.* 29. Now the queſtion is, r he ſhall be delivered on a *habeas corpus*, or put to his writ ? In *Buſhell's Caſe*, which was the firſt where any was d by *habeas corpus* from a commitment of juſtices of *oyer iner*, the commitment was not good in the merits of the but here it is otherwiſe. Then for the word "*remaneat*," mproper; it ſhould have been "*committitur*;" for though rs by the return, that he was in priſon before, yet it might en for another cauſe; but the cauſe for which he was ied being a good cauſe, by a court that has juriſdiction, an improper word be uſed, it is not proper to diſcharge him return of * the gaoler; but if it be ſo on record, he may writ of error.

THE KING *againſt* BYTHELL.

Poſtea, Mich. 10. *Will.* 3. The King *v.* Fell, Keeper of Newgate, *cont.* Vide Vaugh. 135. Poſtea, Paſch. 12. *Will.* 3. Dr. Greenville *v.* College of Phyſicians.

* [76]

Anonymous. Caſe 134.

HOLT, *Chief Juſtice.* If a cauſe of action ariſe partly in county and partly in another, it is in the election of the to lay it in which county he pleaſes: as if a country chap- d a letter to a tradeſman in *London* to ſend him goods into ıtry, he delivers them accordingly, and they come to the ı's hands, there the cauſe of action ariſing in both counties, lay them in either (*a*).

Where cauſe of action ariſes in two counties, it may be laid in either.

2. Roll. Abr. 601. 607. Hob. 330.

1. Salk. 174. 2. Salk. 669. 2. Term Rep. 238. 241. 3. Term Rep. 387. 652.

Scott *Qui Tam v.* Breſt, 2. Term Rep. 238. Mellor *v.* Barber, 3. Term

Anonymous. Caſe 135.

HOLT, *Chief Juſtice.* As a ſheriff is not bound to execute ts in perſon, but may under hand and ſeal direct his warrant r bailiffs, ſo the bailiff of a liberty may do the ſame; but ſervant of the under-bailiff can execute a warrant, but it by the bailiff himſelf to whom the warrant is directed (*a*).

Bailiff to whom writ is directed muſt execute it himſelf.

(*a*) Ante, 73.

Walker *againſt* Rumbald. Caſe 136.

VER AND CONVERSION. Special verdict, that one *J. S.* e a leaſe for years of lands in two hundreds, rendering for rent arrear, the defendant, as bailiff, diſtrained the and *B.* ſold by the bailiff of *A.* in the hundred of *B.* having given perſonal notice, good, diſtreſs: and perſonal notice is more than the act requires, and anſwers the intent of

Diſtreſs taken by the bailiff of the hundred of *A.* in the hun-

4. Mod. 390. S. C. Salk. 247. S. C. Comb. 336. S. C. 2. Ld. Ray. 53. S. C. 396.

cattle

WALKER *againſt* RUMBALD.

cattle as *levant et couchant*, and therefore gave perſonal notice the ſame day to the plaintiff, as owner of the ſaid cattle; and that the plaintiff did not replevy them in five days; that then the defendant, the conſtable of the hundred, took the diſtreſs, and in the preſence of the conſtable of the hundred of *Andover* did cauſe it to be appraiſed, by two appraiſers, in the hundred of *Kinnerſly*; and after the appraiſement ſold the ſame.

And on the ſtatute of 2. *Will. & Mary*, of Diſtreſs, it was objected:

FIRST, The jury have only found a perſonal notice, which is not notice within the ſtatute; for the notice preſcribed, required, is at the manſion-houſe or moſt notorious place on the premiſes.

But PER CURIAM, The intent was only to give a certain notice; and ſeeing in this caſe they have gone farther than the letter of the act, a perſonal notice muſt needs be ſufficient.

SECONDLY, Notice was only given to the owner of the goods, and not to the tenant in poſſeſſion.

But PER CURIAM, The words of the ſtatute are in the diſjunctive, and notice to either is ſufficient.

THIRDLY, The conſtable of *Kinnerſly* adminiſtered the oath, and cauſed the *goods to be appraiſed and ſold only in the preſence of the conſtable of the hundred of *Andover*; whereas the act is expreſs, that the appraiſement and ſale muſt be by the conſtable of the hundred, parith, or place, where the diſtreſs is taken; and that the ſaid conſtable muſt be aiding and aſſiſting therein, which is more than to ſtand by and be ſimply preſent.

* [77]

But PER CURIAM, It appears the diſtreſs is entire, being at one time, and the land being contiguous; and then where ſuch lands are in two counties, and the goods are diſtrained for one entire rent out of thoſe lands, this is one diſtreſs; and by 1. & 2. *Phil. & Mary*, c. 12. they ought to be in one pound: and whereas it is urged, the appraiſement muſt be made by the officers of the pariſh or hundred where the diſtreſs is taken; to that it was ſaid, that the continuing and driving them to the pound is a taking; as *Latch*, 60. (*a*).

Judgment for the defendant.

(*a*) See 2. Wilſ. 354. 3. Wilſ. 295.

Caſe 137.

Anonymous.

Poſtea, Trin. 8 *Will* 3. The King v. Walcot

PER CURIAM. A jointenant, without any authority from his companion, may *diſtrain* for the whole rent; but he muſt particularly *avow* in his own right, and as bailiff of the other.

The

The King and Queen *againſt* Kemp.

Caſe 138.

Grant of an office by the king, after the death, ſurrender, or forfeiture, of the former grant of the ſame office, is good.

S. C. 4. Mod. 275.
S. C. 2. Salk. 465.
S. C. Comb. 334.
S. C. Skin. 446. 580.
S. C. Carth. 350.
S. C. Holt, 419.
S. C. 1. Ld. Ray. 49.
4. Co. 4.
Co. Lit. 3.
Hob. 203.
Stra. 43.
2. Wilf. 166.
2. Bl. Com. 314.
3. Bac. Abr. 725.
4. Bac. Abr. 206. 211. 296.

FACIAS OUT OF THE PETTY-BAG OFFICE, to ſhew why a patent of the twenty-ſeventh year of *Charles the* to *Kemp*, of the office of ſearcher to the port of *Plymouth*, ot be repealed.

aſe was: *King Charles the Second*, the twenty-fifth of *July*, relfth year of his reign, by letters patent granted, *durante ito*, to *John Martin*, the office of ſearcher; and afterwards, s patent, on the nineteenth of *June*, in the twenty-fifth his reign, reciting the former grant, granted to *William* or his life, the ſame office from and after the death, ſur- or forfeiture of *Martin*; after which *Fryar* ſurrendered s patent; and in conſideration of that ſurrender, the king, letters patent, the twenty-fourth of *December*, in the eventh year of his reign, granted this office to *H. Kemp* rom and after the death, ſurrender, or forfeiture of *Martin*; , in the ſame letters patent, reciting all other grants, granted ffice to *R. K.* for his life, from the death, ſurrender, or e of *H. Kemp*, or any other way or means by which the ight come into the king's hands or diſpoſition.

the queſtion was, Whether theſe letters patent to *Kemp* od? the validity whereof depended on the grant to *Fryar*; ie grant * to him be void, the king would be deceived onſideration of his grant to *Kemp*, which was the ſurrender r's letters patent.

it was adjudged for the defendant by SAMUEL EYRE, and HOLT, *Chief Juſtice*, and that the letters patent to were good.

Juſtice. There have been two objections made: That an eſtate for life cannot depend on an eſtate at will. LY, That *Fryar*'s eſtate cannot by rule of law commence death, ſurrender, or forfeiture, of any eſtate at will which had.

THE FIRST: This is not like a grant of lands which are , wherein a freehold may take in poſſeſſion, or be ſupported ticular eſtate in being. This office is no longer in being s granted by the king.

THE SECOND: *Fryar*'s eſtate may have a good com- ent, though it be objected, that the king was deceived in t. This difference is to be obſerved in all caſes where the ſaid to be deceived in his grant: If the matter which is he letters patent be ſuggeſted on the part of the grantee, t to the prejudice of the king, there the king ſhall be ſaid ceived in his grant, ſo as to make it void; but where the f the letters patent are words of the king, although the king y his inference to be miſtaken even in the law, yet the

* [78]

THE KING AND QUEEN *against* KEMP.

king ſhall not be ſaid to be deceived, ſo as to avoid his gran the king grant an eſtate in poſſeſſion, when he intends o grant it in reverſion; or where the thing granted is of a g value than it appears in the grant to be of; theſe are the ſugge of the grantee, and the death of the king in theſe caſes ſhall the grant void: but if the king be not deceived by any matte geſted by the grantee, but is only miſtaken in his own affirn or ſurmiſes, although it be in the law itſelf, ſuch grants are and ſuch conſtruction of them ſhall be made as tend to their ſu and upon this difference the Books are plentiful. 8. *Hen. Dyer*, 197. *b.* 352. *a.* 2. *Cro.* 34. 2. *Brownl.* 242. 1 *Auditor Curl's Caſe. Mod. Rep.* 197. So that where he is deceived the grant ſhall not be void, if by any conſtruction be made good. Now to apply this aptly; the king is not he way deceived in his grant, for the precedent letters patent ar recited; the ſuggeſtion of the party is true; the king did i to grant this office to *Fryar*, only here is an improper limi of the commencement to be after the death, ſurrender, or for of *Martin*; but theſe are the words of the king, and if the have any good * conſtruction they ought to take effect: the of the king ſeems to have been, that *Martin* ſhould have an for life, and the new grant take effect after his death; and t no reaſon why the grant of an office may not take effect aft death of tenant at will, becauſe the place may by poſſibility mine after his death. But ſuppoſe the commencement wholl as no commencement at all, yet the king's mind appearing i commence on the determination of *Martin*'s grant, whenſo happens, according to the opinion in 8. *Co. Earl of Rut Caſe.*

Vide Yelv. 48. 2. Cro. 34. Hob. 229, 230.

* [79]

HOLT, *Chief Juſtice.* The grant to *Fryar* is good. It has be to be void, becauſe it is made to begin on the death, &c. of *M* Now as for the death of *Martin*, that is certainly good, bec might well enough commence from thence. The next th whether it can commence from the ſurrender; for it has be ſiſted on, that an eſtate at will might not be ſurrenderable; a very true, that an eſtate at will in lands between common p is not a ſurrenderable eſtate, becauſe it is at the will of both p and either party may determine his will without the formali ſurrender; and therefore there is no ſurrender at all in law eſtate at will in lands between common perſons. But wh king grants an office at will, that is not at the will of both p it is only at the will of the king to determine the intereſt in the that the grantee holds of the king without any ſurrender; f be an office of truſt, for the profit of the king, he is puniſhal fine for the refuſal of it; and of that he cannot deveſt h without an actual ſurrender, though it need not be proved: was done by two Chief Juſtices, HALE and PEMBERTON, had an eſtate at will in their offices, and made an actual form ſurrender by deed inrolled in chancery; and if the king determi pleaſure, it muſt be by writ of diſcharge under the great ſeal, conſti

Eſtate at will of lands no ſurrenderable eſtate, becauſe at the will of both parties.

Grant of office at will by the king is only at will of the king; for if it be an office of truſt for the king, the perſon is fineable for refuſal of it.

tuting a new perſon. Then on the commencing on the for- THE KING AND QUEEN *againſt* KEMP.
: of *Martin* it is ſaid, that a tenant at will cannot forfeit his
but only determine his will. Now I ſay, the king's tenant
may forfeit; for it may be the king's will not to determine
ate until a forfeiture; he will firſt inform himſelf by inquiſition
cord, whether the party has well behaved himſelf or no,
he will determine his intereſt; which was *Sir J. Savage's*
When there is a conviction on record it is a forfeiture,
h if he be an officer for life there muſt be a *ſcire * facias.* * [80]
ıppoſe the king ſhould determine his will during the life of
n without ſurrender or forfeiture, then *Fryar's* grant ſhall
ımmence during the life of *Martin*, and in the mean time the
nay grant it to whom he pleaſes. But then the queſtion ariſes,
king can grant an office to commence *in futuro*, when there
ɔther eſtate in being to continue until the office ſhall take
? or, Whether the king grant an office to commence on a
gency, a year hence, or the like? AND I AM OF OPINION
r; for though a freehold cannot commence *in futuro*, that is Freehold, though to commence *in futuro*, good, if not derived out of an inheritance.
underſtood where it is derived out of an inheritance. If
be an office in fee, and the king has the inheritance, there a
ld can no more commence *in futuro* by letters patent than by
of ſeiſin: ſo is 5. *Co. Berwick's Caſe.* But if it be a new
created by the king, he may conſtitute it in what manner he
; as a rent *de novo* may be granted and created to commence Things *de novo* created may be granted on any contingency.
ro, or on a contingency; as in the caſe of *Edward the Second*
l in *Corbet's Caſe*, 1. *Co.* 87. for it is a creature of his own,
: may diſpoſe of it as he pleaſes. Now though there were
n officer as a ſearcher, yet in regard there was no eſtate at all
ı, but it remained in the king to create an eſtate, the eſtate
ıg gives is a new eſtate, and therefore ſubject to ſuch a diſ-
n as he thinks fit. It is true, there are not many precedents
ı diſpoſitions until of late days; but why a grant *in futuro*
not be good in ſuch a caſe as this is, it would be hard to
ı cauſe; and therefore

gment for the defendant.

MICHAELMAS TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Thomas Rokeby, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 139. * Anonymous.

No *indebitatus aſſumpſit* lies for money won at play.
Ante, 70.
3. Lev. 118.

PER HOLT, *Chief Juſtice.* No *indebitatus aſſumpſit* lies for money won at play; for money ſtaked on a wager it does, but not otherwiſe; for when the money is in the cuſtody of a third perſon, there the winning the wager determines whoſe property it ſhall be.

Caſe 140. St. Leger *againſt* Pope.

Debt, with averment, different from condition on a bond.
S. C. 1. Lutw. 484.
S. C. N. Lut. 147.
S. C. 4. Mod. 409.

HOLT, *Chief Juſtice.* Debt with an averment in the declaration differs from the condition of a bond; for the plaintiff here muſt fully intitle himſelf to an action, but the condition of a bond goes only in defeaſance, and muſt come on the part of the defendant; and he ſays here, the plaintiff does not intitle himſelf to any action, for he has no cauſe of action, unleſs the hundred guineas as well as the value were unpaid.

S. C. 5. Mod. 4. S. C. Salk. 344. S. C. Comb. 327. S. C. Skin. 572. S. C. Carth. 322.

Foreign coin.

Where foreign coin itſelf is demanded, the action is in the *detinet*, but if the value be demanded, it is in the *debet et detinet*; and the averment

always is, that the defendant hath neither rendered the in nor the value. ST. LEGER *againſt* POPE.

* The King *againſt* Row and Kendall. Caſe 141.

ON to diſcharge *Row* and *Kendall*, committed by THE RETARY OF STATE, being charged with high treaſon, in vy to and aſſiſting the eſcape of *Sir James Montgo-* of the cuſtody of one *William Sutton*, one of the king's s in ordinary, and charged with high treaſon. Commitment to a meſſenger by ſecretary of ſtate good.

S. C. 5. Mod. 78.
S C. 2. Salk. 347.
S.C.Comb. 343.
S. C. Holt, 144.
S. C. Skin. 596.
S. C. 1. Ld. Ray. 65.
S. C. 4. St. Tr. 854.
1. Leon. 71.
2. Leon. 175.

Chief Juſtice. The power of the ſecretary was never l until lately; and as for his commitment to A MESSEN- good; for he may be committed for a time to any-body is under examination; but though for that cauſe this nt had been irregular, it is a queſtion if it would not void.

Y, *Juſtice*, ſaid, that as to THE MESSENGER he may be carrier of him to priſon, and ſo good.

8vo. 333. 5. Com. Dig. 8vo. 140. 1. Bac. Abr. 224. 378. 3. Hawk. P. C. ch. 15. . f. 4. 2. Wilſ. 204. 244. 275. 283. 3. Burr. 1742. 3. Hawk. ch. 13. ſ. 18. and the v. Carrington, 11. State Tr. 316.

IT WAS EXCEPTED, that the warrant does not ſhew for ſon *Sir J. Montgomery* had been committed; and ſo it e been for counterfeiting THE GREAT SEAL, and then no receive him (*a*). So receiving a jeſuit is no treaſon, felony by 27. *Eliz.* In a warrant for high treaſon, the ſpecies of treaſon muſt be expreſſed.

Skin. 596.
2. Wilſ. 158.
1. Burr. 460.
1. Stra. 2.
3. Viner Abr. 515.

Chief Juſtice. If an act of parliament make a felony, before and after are felons, though not mentioned; and affected with the treaſon of *Sir James*.

and ROKEBY, *Juſtices*. The ſpecies of *Sir James* ry's treaſon ought to be expreſſed; and for want of ſhall be bailed (*b*):

they were.

o. 81. 334. Rex v. Wyndham, 1. Stra. 3.
he caſe of Mr. Harvey of Rex v. Wilkes, 2. Wilſ. 158. and
. Mod. 334. 3. Viner Abr. 3. Hawk. P. C. ch. 16. ſ. 17.

Herman *againſt* Denue. Caſe 142.

HEY moved on the ſtatute of 22. *Car.* 2. c. 11. about ates for repairing the church of *St. Swithin*. Union of pariſhes before and ſince the fire of *London*.

r HOLT, *Chief Juſtice*, ROKEBY and EYRE, *Juſtices*, on law there might be a union, but that was only of and but as an appropriation of one rectory to another, e pariſhes were diſtinct; and that did not make the rch of *A.* to be the pariſh-church of *B.* but the incum- S. C. Holt, 522.

HERMAN *againſt* DENUE.

bent was as well incumbent of *B.* as *A.* and is obliged to ſerve the cure, if neceſſary. But by this ſtatute, the pariſh-church of *St. Swithin* is the pariſh-church of *St. Mary Bothaw*, and the other church is thereby deſtroyed; and therefore that pariſh muſt repair *St. Swithin's*; the rates are made diſtinct in this caſe; which THE COURT ſeemed to approve.

* [83]

Caſe 143.

* Price and Others *againſt* Rouſe.

Parſon, and not pariſhioners, to repair the church.

ROUSE, churchwarden, and others, libelled in the ſpiritual court for their proportion of a church-rate for repairing the chancel and church, whereas the parſon *de communi jure* ought to repair the chancel; and no diſtinction being made, prohibition ought to go to the whole.

PER CURIAM. Let it be ſo; of common right, that is by the antient canon and civil law, the parſon ought to have repaired the whole church; and it is by the cuſtom of *England* only that the pariſh repairs the body.

Caſe 144.

Anonymous.

Apprentice ſhould be diſcharged under hands and ſeals of four juſtices; but on *certiorari* to remove an order, not neceſſary to certify the diſcharge.

IF AN APPRENTICE be diſcharged from his maſter, the ſtatute requires the diſcharge to be under the hands and ſeals of four juſtices of peace: but in a *certiorari* to remove an order of ſeſſions thereon, it is ſufficient if the order take notice of the diſcharge ſo made, and it is not neceſſary to certify the diſcharge itſelf.

Caſe 145.

Bower and his Wife *againſt* Coke, Executrix of Coke.

Plea that defendant was adminiſtrater and not executor is a good plea in abatement, but ſhould conclude *quod billa caſſetur*, elſe ill.

S. C. 5. Mod. 136. 145.
S. C. Salk. 298.
S.C Carth. 363.
S. C. Holt, 367. 556.
Ante 46.
Cro Eliz. 108. 565 810.
3. Leon. 197.
8 Mod. 301.
Carth. 99
1.Bac. Abr. 15.

DEBT UPON A BOND againſt the defendant as executrix of her huſband. She pleaded, that he died inteſtate, and that adminiſtration was committed to her, &c. *Unde petit jud. ſi ipſa ad "bill. præd. reſpondere compelli debeat."*

Exception was, that the defendant did not traverſe, ABSQUE HOC that ſhe adminiſtered as executrix.

PER CURIAM. This plea is better without *a traverſe*, for he ſhews the plaintiff in what manner he is chargeable; he has *confeſſed and avoided* all the plea, and has ſhewn that a rightful adminiſtration was committed. It is a foreign intendment that he has adminiſtered any other way; and if he has ſo done, you ſhould have come in and ſhewed it in your replication. But then this concluſion is ill in abatement; every plea ſhould have its proper concluſion; this ſhould be *quòd billa caſſetur*. It is indeed a good plea to the juriſdiction of the court, but not in this caſe.

And a *reſpondeas ouſter* was awarded (*a*).

(*a*) See Linden *v.* Bleſſingham, Com. Rep. 97. Edwards *v.* Harben, 2. Term Rep. 155. Pagett *v.* Prieſt, 2. Term Rep. 597.

Johnſon

* Johnſon *againſt* Baynes.

Caſe 146.

IURRER ON REPLICATION, becauſe the avowry was ly for part of the rent, without ſhewing how the reſt was

T, *Chief Juſtice.* If a rent of a quarter be twenty pounds, I avow only for ten pounds, you muſt ſhew how the reſt is , juſt as in a declaration for part of a debt due upon a bond; this the caſe of *Holt v. Samback* (*a*) is clear.

In avowry for part of a rent, how the reſt was ſatisfied muſt be ſhewn.
S.C.Comb.346.
S. C. 5. Mod. 77
S. C. Holt, 555.

Cro. 103, 104.—See alſo Anonymous, ante, 72. Hawkins *v.* Gardner,

Wigmore *againſt* Veal.

Caſe 147.

NDER cannot be pleaded after imparlance; it is no bar to : action, and only excuſes the penalty; and therefore in a tender, you muſt plead *touts temps priſt*, and conclude licium *de damnis*, which can never be after imparlance.

the penalty.

Tender cannot be pleaded after imparlance, for no bar to the action, but excuſes
Ante, 8. 72.

Anonymous.

Caſe 148.

IERI FACIAS be taken out and renewed within a year, and thin every year, you may enter your mean continuances.

Poſtea, Paſch. 12. *Will.* 3. Paramour *v.* Johnſon.

Lord Gerrard *againſt* Lady Gerrard.

Caſe 149.

)R OF A JUDGMENT in dower from the court of common is.

QUESTION was, Whether *Lady Gerrard* were dowable *utley-Hall*, being pleaded to be *caput baron.*?

PER CURIAM, There are three ſorts of barons, *viz.* by te- writ, and by patent. The firſt, which were feodal barons, ertain territory of land *per baron.* wherein there was a caſtle, ito all the inhabitants in time of war reſorted, and theſe were *ta baroniæ*; and there was no dower of them, becauſe they r defence. By cuſtom, we call noblemen barons of ſuch a ut that is no barony; for a real barony is when the king lands, rents, &c. to be held *per baron.* none of which have anted ſince the time of *King Richard the Second.*

Feme not dowable of *caput baroniæ*, but of a capital meſſuage ſhall.
S C. 5.Mod. 64.
S.C. 3.Lev. 401.
S. C. 1. Salk. 54. 253.
S. C. Holt, 260.
S. C. 1. Ld. Ray. 72.
S.C. Comb. 352.
S. C. Skin. 592.
Ante, 59.
Co. Lit. 30.
3. Com. Dig. "Dower" (A. 8)

*[85]

* Herbert *againſt* Walters.

Caſe 150.

LEVIN. The defendant avowed, as overſeer of the poor, the 43. *Eliz.* c. 2. the plaintiff was nonſuited, and the itted to enquire of damages.

Where jury not charged with enquiry of damages may be

y writ of enquiry: and wherever an attaint lies not, an omiſſion may be ſupplied by writ of —S. C. 1. Salk. 205. S. C. Comb. 344. S. C. Skin. 395. S. C. Carth. 362. S. C. Holt, C. Ld. Ray. 59. S. C. 5. Mod. 118. 10. Co. 119. Comb. 11. Skin. 595.

HERBERT *againſt* WALTERS.

The queſtion was, Whether this omiſſion could be ſupplied by a writ of enquiry within the laſt paragraph of the ſtatute?

HOLT, *Chief Juſtice*, delivered the opinion of the Court that it might. It is true, if there be an iſſue, and the jury find the iſſue and omit to enquire of damages, that cannot be ſupplied by a writ of enquiry, for the jury have diſcharged themſelves; for the finding of damages was part of their iſſue; but here is no omiſſion, the jury was not charged, and therefore a writ of enquiry may go. Beſides, after verdict damages cannot be ſupplied by a writ of enquiry, becauſe the party would loſe his remedy by writ of attaint, which lies not in this caſe; and ſo is 1. *Cro.* 143. *Durroſſe v. Newbott*, 1. *Roll. Rep.* 272. *Brampton's Caſe*, 2. *Roll. Rep.* 112. 1. *Sid.* 380. This has been the difference taken in all caſes, that where no attaint lies, an omiſſion may be ſupplied by writ of enquiry; and therefore let it go here *(a)*.

(a) See Valentine *v.* Fawcett, 2. Stra. 1021. Dewell *v.* Marſhall, 2. Bl. Rep. 921. S. C. 3. Wilſ. 442. Freeman *v.* Lady Archer, 2. Bl. Rep. 763. and 5. Com. Dig. "Pleader" (Z. 1.).

Caſe 151. Young *againſt* Rud.

Whatever is given in ſatisfaction muſt be taken in ſatisfaction.

S. C. 5 Mod. 86. S. C. 2. Salk. 627. S.C. Comb. 346. S. C. 1. Ld. Ray. 60. S. C. Carth. 347. 9. Co. 80. 2. Term Rep. 24.

ASSUMPSIT FOR GOODS SOLD. The defendant pleaded, that he gave him a beaver in ſatisfaction, and that he accepted it in ſatisfaction. The plaintiff replied by proteſtation, that he did not give it in ſatisfaction, ABSQUE HOC that he did not receive it in ſatisfaction.

PER CURIAM. Pleading the giving in ſatisfaction without the receiving in ſatisfaction is not ſufficient, for there muſt be a mutual act done; one muſt give, and the other muſt take; and in this caſe either of them are traverſable.

Judgment was given for the plaintiff *(a)*.

Winch, 76. Cro. Eliz. 68. Stra. 573. 1. Com. Dig. "Accord" (C.).

(a) See Paine *v.* Maſters, 1. Stra. 573.

Caſe 152. Stayner *againſt* The Burgeſſes of Diotwiſch.

Camden's Britannia, to prove a *particular cuſtom*, in evidence refuſed.

S. C. 1. Salk. 281. 6. Mod. 225. 248. 1. Lev. 25.

UPON A TRIAL AT BAR *(a)*, *Camden's Britannia* was offered in evidence to prove a particular cuſtom.

But THE COURT would not admit it; for general hiſtory that relates to the whole kingdom is proper to be given in evidence in a matter relating thereunto; and the nature of the thing requires it

Plowd. 426. Yelv. 34. 5. Mod. 272. 7. Mod. 129. 3. Mod. 259.

(a) This was an iſſue directed out of the court of chancery to try whether, by the cuſtom of *Droitwich*, ſalt-pits could be ſunk in any part of the town, or in a certain place only, S. C. Salk. 281.

when

en it cannot otherwiſe well be proved; and * therefore in the e of *Neal v. Jay* (*a*), a deed was produced dated in the firſt ir of the reign of *Philip and Mary*, and Chronicles were admitted prove that *King Philip* did not uſe the ſtile which was in the d at that time: ſo in *Robert Henly's Caſe* (*b*), to prove the urſe of the Court *the Year-Books* were read in evidence; *heralds ks* have been allowed evidence in pedigrees (*c*); and *regiſter ks* of pariſhes in chriſtenings and marriages (*d*), though no law r it; for the nature of the thing requires it.

STAYNER *againſt* BURGESSES OF DROITWICH.

(*a*) See alſo Lord Brounker *v.* Sir bert Atkins, where *Speed's Chronicle* s given in evidence to prove the death *Iſabel*, queen-dowager to *Edward the* d. Skin. 15. S. C. 1. Vent. 149. (*b*)

(*c*) Thanet *v.* Foſter, 2. Jones, 224. Bull. N. P. 248. Pilton *v.* Walter, 1. Stra. 162.

(*d*) See May *v.* May, 2. Stra. 1073. Gilb. Evid. 3d edit. 76. Bull. N. P. 247.

Stedman *againſt* Page. Caſe 153.

REPLEVIN BY TWO COPARCENERS; one avows for the moiety of the rent.

Coparceners muſt join in avowry.

PER CURIAM. Coparceners are but one tenant to a *præcipe*, hey muſt join in one action of treſpaſs; and ſo in a *mortdanceſtor*, where only the right is concerned; and therefore much more in eplevin, which goes to the right and to the poſſeſſion.

S. C. Salk. 390. S. C. Comb. 347. S. C. 5. Mod. 141. S. C. 1. Ld. Ray. 64. Carth. 364.

Judgment was given for the plaintiff.

1. Salk. 187. 1. Bac. Abr. 444. Cowp. 219. 2. Bl. Com. 188.

Stayner *againſt* Baker. Caſe 154.

A BILL imports it being under hand and ſeal, and not a note in writing only. A promiſe cannot be extinguiſhed by a bill under hand alone, becauſe in law it is of no higher nature. A ond is no ſatisfaction of money due, though it may be of money efore it is due.

Promiſe cannot be extinguiſhed by bill under hand alone.

Poſtea, Trin. 12. *Will.* 3. The

King *v.* Woolaſton. Trin. 13. *Will.* 3. May *v.* King. Bond no ſatisfaction for money due.

Smith *againſt* Sharp. Caſe 155.

PER CURIAM. There is a difference between doing a thing by a man and his aſſigns, and to them. If a thing be to be done by a man and his aſſigns, you muſt there alledge in the disjunctive, that it was neither done by him nor his aſſigns: but if a thing be to be done to a man and his aſſigns, you need not mention his aſſigns; for if he has aſſigned it over, it muſt be ſhewed of the other ſide.

Difference between doing a thing by a man and his aſſigns, and to a man and his aſſigns.

S. C. 5. Mod. 133.

S. C. Salk. 139. 1. Mod. 67. 8. Mod. 238. 1. Stra. 199. 1. Bac. Abr. 547.

Holford

Caſe 156. * Holford *againſt* Lawrence.

Judge of *Niſi Prius* may by conſent make a rule to refer, and oblige the parties to ſtand by it; ſo cannot juſtices, but muſt be as their own order.

A JUDGE OF NISI PRIUS may, by conſent of parties, make a rule to refer, and then oblige them to ſtand to the determination; yet the ſeſſions cannot ſo do, though it be by conſent; yet we muſt allow them ſuch a power. They may indeed refer a thing to another to examine, and make a report to them thereof, but not as in this caſe, to be finally determined by him.

Caſe 157. Anonymous.

Poſtea, Trin. 8. *Will.* 3. Philips v. Crab.

PER CURIAM. The ſecond *ſcire facias* ſhall not be taken out before the firſt be returnable.

HILARY

HILARY TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Gregory, *Knt.*
Sir Thomas Rokeby, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Eſq. Solicitor General.*

Fletcher *againſt* Ingram.

Caſe 158.

REPLEVIN. The defendant juſtifies as bailiff to *Sir R. G.* that the place WHERE is within the manor of *D.* and that they have by preſcription A COURT-LEET there; that they ive a cuſtom, that the jury ſhall chuſe a conſtable, and impoſe a pe- lty upon him of forty ſhillings if he refuſe; that the plaintiff was ected at a court-leet, under the penalty, *et inde notitiam habuit*, but d not execute the office; whereby he incurred the penalty of rty ſhillings, of which there was a preſentment the next court; but he totally omitted to pay it, and therefore the defen- nt diſtrained. The plaintiff demurred.

Quære, Whether the lord of a leet can diſtrain for an amerciament without a ſpecial cuſtom ſo to do.

* [88]

S. C. 5. Mod. 127. S. C. 1. Salk. S. C. 1. Ld. Ray. 1. Bac. Abr. 439.

5. S. C. Comb. 350. S. C. Holt, 187. S C. Skin. 635. S. C. Lilly, 369. 1. S. C. Ray. Ent. 117. 1. Salk. 175. 380. 8. Co. 38. 4. Com. Dig. 696. Hawk. P. C. ch. 10. ſ. 32.

And *per* HOLT, *Chief Juſtice*, A conſtable belongs to every ect of common right; but whether of common right the ſteward r jury ought to chuſe him has been controverted: but ſuppoſe f common right the ſteward ought, and by cuſtom the homage do, the perſon thus elected do refuſe in court, the ſteward may impoſe

Steward cannot fine a perſon for not executing the office of conſtable, unleſs he refuſe in open court, but it muſt

preſented by the homage at the next leet, and be amerced, and that amerciament aſſeered.—Sir T. nes, 212.

a fine

FLETCHER *against* INGRAM.

a fine upon him. Indeed, if he be not preſent the ſteward cannot fine him, becauſe the omiſſion or refuſal is out of court; and therefore he is to be preſented to the homage at the next leet, and to be amerced, and the amercement to be affeered; which fines and amerciaments, being by common right, may be levied by diſtreſs. Now here is a cuſtomary penalty contrary to common right; you tax the penalty before the refuſal; and ſo this being not of common right, you could not have diſtrained without alledging a particular cuſtom for ſo doing. Then as to the notice, "*notitiam habuit*" is too general; you ſhould have pleaded, that he was ſummoned within a convenient time to take the oath before a juſtice of peace, which is the courſe uſually taken; for the ſteward, after the adjournment of the court, has no authority; and though before the ſtatute of 13. & 14. *Car.* 2. the juſtices of peace could not make conſtables, yet ſwear them they could. But if it be objected, that juſtices of peace could not ſwear them, for they are within memory of man, and leets have been by cuſtom *temps dont*, &c.; I anſwer, though as to the form of their commiſſion and authority they are of late, yet they have the ſame power as conſervators of the peace at common law had. All the conſervators power is veſted in the juſtices, and in that quality they ſhall be intended to ſwear conſtables.

Notice, *notitiam habuit* is too general.

Vide Holt's opinion, ante, 29.

ROKEBY, *Juſtice*. The defendant has failed in not alledging before whom the oath ought to have been taken, and has not alledged a cuſtom for the diſtreſs.

Judgment was given for the plaintiff.

Caſe 159.

Anonymous.

DARNELL moved to quaſh an indictment for want of "*adtunc* "*et ibid. impanellat.*" It has been often adjudged, that the want of "*onerat.*" is bad.

THE COURT. Let it be quaſhed *niſi*, for "*returnat.*" will not ſupply it.

*[89]

Caſe 160.

* The King *againſt* The Pariſh of Wootton Rivers.

In an order of removal, it is not neceſſary to ſay the perſon rented a houſe of ten pounds *per annum*.

HOLT, *Chief Juſtice*, delivered the opinion of the Court, that the order is good, though it is not ſaid that he rented a houſe of ten pounds a-year, according to 13. & 14. *Car.* 2. c. 12. for it has been the conſtant practice never to expreſs it (*a*).

Order muſt be on complaint of the churchwardens and overſeers.

But this order is bad, becauſe it is only ſaid to be "on com- "plaint" generally, and not "on complaint of the overſeers and "churchwardens." This ſpoils the order, for no man can diſturb another coming into a pariſh except he have authority ſo to do (*b*).

S. C. Holt, 520. S. C. Salk. 492. S. C. Carth. 365. S. C. 3. Salk. 254. S. C. Sett. & Rem. 18. 165. S. C. Foley, 72.

(*a*) Rex *v.* South Marſton, Stra. 189. But ſee Rex *v.* Forreſt, 3. Term Rep. 38.
(*b*) Rex *v.* Harely, Andr. 361.—

A complaint

THE KING *againſt* THE PARISH OF WOOTTON RIVERS.

ɔplaint *ex officio* to the juſtices is nothing. It may be the is willing to keep the party; and if ſo, the juſtices cannot him on complaint: and though the juſtices have returned *certiorari*, that this order was made "on the complaint of churchwardens," that will not help it, becauſe it is but a bare ion, though returned on record.

Chamberlain *againſt* Huetſon.

Caſe 161.

RE was a libel *ex officio* againſt *Chamberlain* for incontiency, at the promotion of *Mrs. Huetſon*, who is alledged with her huſband: whereupon there is a ſentence given, e enjoined, and, according to the courſe of the court, coſts d to *Huetſon*, who is not divorced *à menſâ et thoro* from her d. The huſband releaſes the coſts to *Chamberlain*. She this in the eccleſiaſtical court; and the plea being reſhe prayed a prohibition.

A huſband may releaſe coſts awarded to his wife, in the ſpiritual court, if there be no divorce; if there be, he cannot, becauſe ſuppoſed to ariſe out of her alimony: but he may releaſe a legacy, though after divorce.

LT, *Chief Juſtice*. Now I take this difference: If a *overt* ſue for defamation in the ſpiritual court, and obtain ce, and coſts are given her, if ſhe cohabit with her huſband time he may releaſe them; but if ſhe be divorced *à menſâ et* though the marriage ſtill continue, he cannot, becauſe if is a divorce, the huſband is to allow the wife alimony; and if s alimony, the coſts expended in the ſuit are ſuppoſed to iſſue it, and therefore the huſband cannot releaſe it, becauſe ſhe ſeparate; which is the reaſon, though not mentioned, of *n's Caſe*, 2. *Roll. Abr.* 301. But if ſuch *feme covert*, after divorce, ſue for a legacy, which legacy if ſhe recover comes huſband, there the huſband may releaſe, 2. *Roll. Abr.* 301. ſe there is no * alimony; and if he may releaſe the duty, he eleaſe the coſts: therefore in this caſe he may releaſe the there being no divorce. I think a prohibition muſt be d.

S. C. 1. Salk. 115. S. C. Holt, 99. S. C. 1. Ld. Ray. 73. S. C. 5. Mod. 70. 2. Com. Dig. "Baron and "Feme" (O.). 1. Bac. Abr. 211. 290. 3. Bac. Abr. 485. 4. Bac. Abr. 262. Hull. on Coſts, 599.

t ROKEBY, *Juſtice*, on account of the ſcandalouſneſs of the was againſt it. And afterwards a propoſal was made for bringe money into court, for *Mrs. Huetſon* to take out as ſhe had on to carry on the charges of the prohibition, and then to e: *ſed materia dormivit.*

Culliford *againſt* Cordonmy.

Caſe 162.

DEPUTY give a bond to account for the profits he receives, d to pay his maſter half of them, that is not within the ſtatute *Edw.* 6. c. 16. for it is reaſonable that the deputy ſhould be or his pains. If it had been for a ſum in groſs, or the payment

Bond for deputy to have half the profits of an office which is within the 5. S. C. Holt, 506.

i. is good, not being for a ſum certain.—S. C. Comb. 356. S. C. Salk. 466. Comy. Rep. 2. 3. Bac. Abr. 731. 5. Com. Dig. "Officer" (K. 1.).

Cullford *againſt* Cordonny.

ment of an annual ſum not iſſuing out of the profits of his office, it had been ill; but this well enough.

Judgment for the plaintiff *(a)*.

(a) See Blankard v. Galdy, 4. Mod. 215. and 4. Burr. 2494.

Caſe 163. Burman *againſt* Sheppherd.

In trover for a bill of exchange, money not allowed to be brought into court.

IN TROVER for a bill of exchange for one hundred pounds, *ad damnum* of one hundred and fifty pounds, a motion was made, that upon bringing fifty pounds into court it might be ſtruck out of the declaration.

HOLT, *Chief Juſtice*. This practice in *aſſumpſit* has been brought in within few years, and has been only allowed becauſe payment goes to the iſſue; but in *trover* it goes only to the damages. It may be, the plaintiff has good cauſe of action for part, and a probable cauſe for the reſidue; now it would be hard to ſtrike out his certain cauſe, and put him to try his probable cauſe at the peril of coſts *(a)*.

S.C. Comb. 357. Poſtea, Trin. 8. *Will.* 3. Pawlet v. Heatfield. Paſch. 10. *Will.* 3. Smith v. Johnſon. Mich. 10. *Will* 3. Lawley v. Dibble. Paſch. 12. *Will.* 3. Farrell's Caſe.

(a) In what caſes money may be brought into court, ſee Tidd's Practice, 409 to 412.

EASTER TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Armitage *againſt* Row. Caſe 164.

A MOTION was made, that the plaintiff may file his original, and enter up the iſſue on record, for he has ſince arreſted the defendant three times for the ſame cauſe of action: and the defendant doubted whether he might plead in bar another action pending, with a *prout patet per record.* before it was entered.

It may be pleaded in bar, that another action is pending for the ſame cauſe, *prout patet per recordum*, before the iſſue is entered.

PER CURIAM. He may: if they do not enter it, you may, without any motion in court, give a rule to enter it.

HOLT, *Chief Juſtice.* The altering the antient method of the common pleas, as to the imparlance-roll and the plea roll, has cauſed great confuſion. Formerly, a declaration was entered on the roll the ſame day wherein the writ was returnable, with an imparlance over to the next Term, which was called THE IMPARLANCE ROLL, and then the next Term they entered their declaration over again, with an *alias prout patet* on another roll, which they called THE PLEA ROLL: but now the prothonotaries have thought fit to alter the courſe, making the plea roll an original roll of the ſubſequent Term, without an *alias prout patet*, or any relation to the precedent Term, except in the caſe of privilege and *ſcire facias*, where they now enter an *alias prout patet.* There was

ARMITAGE *againſt* Row.

was a caſe ſometime ago by writ of error in this court, which was ſettled after great argument, *viz. Moyle v. Hawkey*, wherein there was entry, with a continuance to the ſubſequent Term, but no entry in the ſubſequent Term, with an *alias prout patet*, or any relation to the precedent Term, and yet we affirmed the judgment, becauſe of the new practice now introduced.

*[92]

Caſe 165.

* Robert *Qui Tam againſt* Witherhead.

If a ſtatute, *viz.* the Navigation Act, 12. *Car.* 2. ordain, that no goods ſhall be imported but in *Engliſh*-built ſhips, &c. "under the penalty and forfeiture of ſhip "and goods, "one moiety to "the king, the "other to him "that ſhall in"form, *ſeize*, "or ſue for the "ſame," without ſaying by what mode of proceeding, an *action of detinue* will lie before ſeizure for ſhip and goods ſo forfeited: for the property is *deveſted* out of the owner by the forfeiture, and *veſted*, by commencing the action, in the perſon who ſues. S. C. 1. Salk. 223. S. C. Comb. 361. S. C. 5. Mod. 193. 11. Co. 89. Hard. 353. 2. Bac. Abr. 47. Vide 1. Inſt. 46. b.

DETINUE on the ſtatute 12. *Car.* 2. c. 18. of Navigation, for thirty-ſix barrels of oil of ſix hundred and thirty-nine pounds as forfeiture, for importing goods in a veſſel not belonging to *England*, nor being navigated by the maſter and mariner, three parts whereof were *Engliſh*, *&c.*

The queſtion was, Whether *detinue* lay on this ſtatute?

And PER TOTAM CURIAM, Judgment for the plaintiff.

HOLT, *Chief Juſtice*. The deſign of this act was to make an immediate alteration of the property of the goods; the one moiety to the king, the other to him who would inform and ſue for the ſame. If he had ſeized the goods, or any part in the name of the whole, no one will doubt but *detinue* would have laid. At common law, a villein had abſolute property, and the lord had it not till ſeizure made. If a villein before ſuch ſeizure had aliened, the lord could not touch them; but if they were diſtrained before ſeizure, the lord could replevy them (*a*): and yet a replevin ſuppoſes an antecedent right as much as a detinue; and the reaſon is, becauſe the bringing a replevin amounts to a claim and ſeizure, and *eo inſtante* veſts the property in the lord. In debt upon a bond, where the contract is to pay the money on requeſt, the party brings his action without any requeſt, yet the bringing the action is one; ſo here, the bringing a detinue amounts to a ſeizure.

ROKEBY, *Juſtice*. The property is deveſted out of the owner by importation, but not veſted in him that ſues until bringing the action or ſeizure (*b*).

(*a*) Co. Lit. 145. b.

(*b*) In Hilary Term, 33. *Geo* 3. it was adjudged, on the authority of the above caſe, that if a ſhip be ſeized as forfeited under the Navigation Act, 12. *Car.* 2. c 18. by a governor in a foreign country belonging to *Great Britain*, the owner cannot maintain *trover* againſt the party who ſeized the ſhip, although he do not proceed to condemnation; for the property is diveſted out of the owner by the forfeiture. Wilkins and Others *v.* Deſpard, 5. Term Rep. 112.

Hoard

Hoard *againſt* Teniſon. Caſe 166.

ACTION UPON THE CASE for ſix ſeveral promiſes, all of them laid the twenty-firſt of *October*. The defendant pleaded *infra ætatem* generally. The plaintiff replied ſpecially as to two of the promiſes *præcludi non debet*, becauſe the defendant was of full age at the time of making them; and *quoad placitum* as to the reſt, it was *pro neceſſario veſtitu* according to his degree.

In caſe, the preciſe day is not material; and if you force the plaintiff to vary from it, it is no departure.

Poſtea, Mich. 8. *Will.* 3. Blackhall *v.* Eccles.

The defendant demurred, becauſe the replication was repugnant in itſelf, it being impoſſible that a man ſhould and ſhould not be of age on the ſame day.

Mich. 8. *Will.* 3. Wall *v.* Dukes. Comb. 361.

PER CURIAM. The day is but circumſtance and not material, and no part of the iſſue: a man is not bound preciſely to the day in his declaration; and if you force him to vary from it, it is no departure.

Judgment for the plaintiff.

* [93]

* Thwaits *againſt* Lady Aſhfield. Caſe 167.

IN DEBT FOR RENT the plaintiff declared, that certain houſes in *London* were burnt down by the general fire, and recited the acts for rebuilding the city; and that by virtue of thoſe acts, at a court of judicature at *Clifford's Inn*, a leaſe was decreed to be made to the defendant of the premiſes for fifty-one years, under the yearly rent of fifty-three ſhillings and fourpence; and avers, that for nineteen years rent for the premiſes, ending at *Michaelmas* laſt, there was due to him fifty-eight pounds thirteen ſhillings and fourpence; *quod actio accrevit.*

If a plaintiff demand by his declaration more rent than is due, he may, on releaſing of the overplus, have judgment for the reſidue.

S.C. Comb. 365. S. C. 5. Mod. 212.

The defendant pleaded *nul tiel record* of the decree mentioned in the declaration.

The plaintiff prayed a *certiorari* to the mayor and aldermen of *London* to bring in the record; and ſo it was.

IT WAS MOVED *in arreſt of judgment*, that the plaintiff demanded more rent than appears, by his own ſhewing, to be due; and though the plaintiff has entered a releaſe on the record of the overplus, yet this will not help it, the demand being entire.

NORTHEY *contra* argued, that the eight pounds being releaſed, the plaintiff might take his judgment for what was due; and this is warranted by all authorities. So in an *aſſumpſit* on ſeveral promiſes, if the declaration as to ſome be well, and as to others ill, the plaintiff may take judgment for what is well; and there is no difference between *debt* and *aſſumpſit*, for the demand is entire in both. So is *Hob.* 178. *Stil.* 175. and 1. *Roll. Abr.* 785. *Barber v. Pomroy*, which is a caſe in point; and argued further *prout.* 1. *Saund.* 285, 286.

1. Vent. 49. 1. Roll. Rep. 335. 1. Bulſt. 155. Vide 2. Lev. 4.

THWAITS *againſt* LADY ASHFIELD.

But SELBY ſaid, this was entire, and that in *Hobart* they were ſeveral; and the demand *quòd reddat ei* the whole ſum due on all bonds.

HOLT, *Chief Juſtice.* The *placitum* in that caſe was entire, and demand *quòd reddat ei* the whole ſum due on all bonds; and if one appear not to be due, he ſhall recover for all the reſt. By the ſame reaſon, if debt be for a hundred pounds, and it appears that there is but ninety pounds due, upon releaſe of the odd ten pounds he ſhall have judgment for ninety pounds; and in this caſe, if they had gone to trial, and the jury had found that but fifty pounds thirteen ſhillings and fourpence had been due, it had been good. The caſe of *Barber v. Pomroy* is good law.

Judgment for the plaintiff.

But PER ME, If demand be of leſs than is due, it will be fatal. 1, *Cro.* 137. 104.

Caſe 168.

Anonymous.

S. P. poſt. 128. Dougl. 437. Stra. 479. 1. Term Rep. 363.

AFTER A TRIAL AT BAR no new trial ever granted purely becauſe the jury went againſt evidence, except at the end of the laſt reign, which was irregular *(a)*.

(*a*) See Bright *v.* Eynon, 1. Burr. 395. and Stra. 584. 2. Ld. Ray. 1358. 1. Peer. Wms. 312. that the Court will grant a new trial after a trial at bar, when the juſtice of the caſe demands it.

TRINITY TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

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* Philips *againſt* Crab.

Caſe 169.

WHEN the attornies on both ſides are to attend the ſtriking a jury on A TRIAL AT BAR, if one will not attend on due notice, the jury ſhall be ſtruck *ex parte*, and the ſheriff ſhall ſtrike twelve for him that does not attend.

A jury on a trial at bar may be ſtruck *ex parte*.

Anonymous.

Caſe 170.

PER CURIAM. Two *ſcire facias* ſhall not be taken out both together; for the future, the ſecond ſhall not be taken out till day of the return of the firſt.

Scire facias. Ante, 87.

In the common pleas they have but one *ſcire facias*, but then there muſt be fifteen days between the *teſte* and the return of the writ, and that returnable too on a common day; but each writ is returnable here in eight days, on a day certain; ſo that leſs time is here neceſſary for both than in the common pleas for one.

Case 171.

The King *against* Giles.

A return of rescue out of the hands of *bailiffs*, is good.

MOTION to quash a rescous returned against *Giles*, bec said to be *ex custodiâ ballivorum*, whereas it should be *ex c diâ vicecom.*; for the custody of bailiffs is the custody of sheriff

Sir T. Jo. 197.

PER CURIAM. Both ways are good; and so it has been quently adjudged.

* [95]

Case 172.

* Pawlett *against* Heatfield.

Money not allowed to be brought into court on covenant for payment of rent.

Ante, 90.

IN AN ACTION OF COVENANT on three distinct covenants several breaches were assigned; one was for non-payment of rent.

A motion was made, that upon bringing ten pounds into c it might be struck out of the declaration.

But THE COURT denied it; for when it appears that the plai has just cause of action for one thing, they will not put him t the rest at the peril of costs (*a*).

Postea. Pasch. 10. *Will.* 3. Smith *v.* Johnson. Mich. 10. *Will.* 3. Lawley *v.* Dibble. Pasch. 12. *Will.* 3. Farrell's Case.

(*a* See Gregg's Case, 2. Salk. 596. Anonymous, 1. Wilf. 75. and the case of Hallett *v.* The East India Company, 2. Burr. 1120.; in which last case LORD MANSFIELD says, "In motions of this kind the "true and sensible distinction is, that "where the sum demanded is a *sum certain*, "or capable of being ascertained *by mere* "*computation*, without leaving any other "sort of discretion to be exercised "jury, it is right and reasonable to "the defendant to pay the money "court, and have so much of the "tiff's demand upon him struck "the declaration, and that if the pl "will not accept it he shall proce "his peril." See also 4. Term 579.

Case 173.

The King *against* Walcot.

Attainder of treason reversed for want of *ipso vivente*, or *in conspectu ipsius*, as to the *interiora*.

S.C 2. Salk. 632. S.C. 4. Mod. 395. S.C. Comb. 369. S.C Carth. 348. S.C. Show. P C. 127. S C. Holt, 680. S. C. 3. St. Tr. 600. S. C. 6. St. Tr. App. 42. Vide Dalt. c. 141.

ERROR to reverse an attainder of *Walcot* for compassing death of the king.

The error insisted on was, the omission of "*ipso vivente* "*in conspectu ejus*" in that part of the judgment which was *inte* *sua extra ventrem suum capiantur et in ignem ponantur.*

THE COURT gave their opinion *seriatim* that the judgm erroneous.

EYRE, *Justice*. There are multitudes of precedents w *ipso vivente* is mentioned: In *Humphrey Stafford's Case* (*a*), tioned by *Bro.* "*Cor.*" 128. there are some omissions in that ment as reported, but on the roll it is full in every particular. is *Ed Bohun's Case* (*b*). So is *John Bemg's Case* (*c*). So i of *Rob. Dudley* (*d*). The same in *Stamford's Pleas o Crown* (*e*). So *J. Littleton's Case* (*f*); and my *Lord Stai Case* (*g*), by the advice of all the Judges. It is objected

(*a*) 1. *Hen.* 7. pl. 24.
(*b*) 13. *Hen* 8. Stow. Chron. 513.
(*c*) 3. *Edw.* 6 Co. Ent. 699.
(*d*) 1. *Mary*, Plowd. 387. Rastal, 645.
(*e*) S. P. C. 182. a.
(*f*) 43. *Eliz.* Co. Ent. 422. 210.
(*g*)

THE KING *againſt* WALCOT.

roſternetur is enough; but to that it may be anſwered, both the other are in the precedents. It is objected, that there ne precedents without it, as that of *David Prince of a*); but that was a judgment in parliament; and if we look *ton's Records*, they increaſed or leſſened the puniſhment, in judgments in parliament, according to the greatneſs or leſs of the offence. Beſides, all attainders before the twenty-ar of *Queen Elizabeth* are not to be regarded, there being f parliament on purpoſe to confirm them.

EBY, *Juſtice, acc.* That it is not in the power of the Judges to or diminiſh any part of the puniſhment, by making it or milder; * and if this judgment ſhould be affirmed with ſſion, we muſt ſay in effect, that all thoſe judgments wherein re erroneous, and by conſequence muſt be reverſed.

* [96]

r, *Chief Juſtice, acc.* Though the omiſſion of this part of gment be for the benefit of the party attainted, yet ſtill it is being a neceſſary part of the judgment; and this is agreeable rules of law in other caſes: as in debt on bond, the plaintiff to his damage, and judgment given that the plaintiff ſhould his debt, but no notice taken of the damages; though this be for the advantage of the defendant, he may aſſign it for ecauſe it is a neceſſary part of the judgment. I am con-y the vaſt number of precedents in all kings reigns, ex-e old obſolete ones and a few in *King Charles the Second's* hich were of no great conſequence; and if this be not good, udgments that have theſe words muſt be reverſed; for then dgments are more ſevere than the law allows. And if they , this is leſs ſevere; and judgment in all capital caſes is d ſettled by the common law, which no court can alter.

Yel. 107. 8. Co. Beecher's Caſe.

Poſtea, Mich. 11. *Will.* 3. Dillon *v.* Walcot. Sho. Par. Ca. 127.

refore the attainder was reverſed.

judgment of reverſal was affirmed in parliament.

(*a*) Fleta, lib. i. 16. 2. Inſt. 195.

Anonymous. Caſe 174.

QUESTION in this caſe was, Whether one jointenant may t only diſtrain, but alſo avow, in his own right, without any conuſance alſo as bailiff to the other jointenant; and e of *Bowles v. Poor* (*a*) was objected, where a huſband ed for rent due to the wife in his own right only, and ad good.

One jointenant may diſtrain for the whole rent; but when he avows, it muſt be for part in his own right, and make conuſance as bailiff for the reſt.

that was becauſe the right of the rent was in the huſband ut here it is otherwiſe.

Ante, 77.

COURT. One jointenant may diſtrain for the whole; but e avows, it muſt be for part in his own right, and make co-, as bailiff to his companion, for the reſt; and when judgment n for a return, it muſt be according to the right of both.

(*a*) 2. Bulſt. 135. Cro. Jac. 282.

Bailiff, or not, traverſable in replevin.

NOTE, In the caſe of *Trevilian v. Pine* (*a*) it wa that bailiff or not was traverſable in replevin.

(*a*) In the common pleas, in Eaſter Term, 6. *Anne.*

* [97]

Caſe 175.

Huſſey *againſt* Jacob.

Bill accepted for money won at play ſhall not be recovered againſt the acceptor, even by an innocent indorſee for a valuable conſideration.

S. C. 5. Mod. 175.
S. C. Salk. 344.
S. C. Carth. 356.
S. C. Holt, 328.
S. C. Com. Rep. 4.
S. C. 1. Ld. Ray. 87.
S. C. Ray. Ent. 136.
4. Com. Dig. "Juſtices of "Peace" (B. 42.).
4. Bac. Abr. 65.
2. Term Rep. 439.

ACTION ON THE CASE on a bill of exchange, ſett cuſtom of merchants; and that if any merchant bill directed to another, and he to whom it is * direct that he becomes chargeable therewith; that *Lord Ch* commerce according to the ſaid cuſtom, did make and to *A. Jacob* the defendant, who accepted it, and by v he became chargeable.

The defendant pleaded the ſtatute of Gaming, 16. that *Lord Chandos* and the plaintiff played togethe and that at that playing *Lord Chandos* loſt to the plaint hundred pounds at one ſitting; that for this money ſo this bill, which by force of the ſaid act is void.

The plaintiff demurred, and ſhewed for cauſe, t amounted to the general iſſue (*a*).

And PER CURIAM,

FIRST, In all cauſes where a man admits the action, for ſpecial matter, that matter may be ſpecially pleade may likewiſe be given in evidence on the general iſſu

SECONDLY, That in this caſe the acceptor may w ſtatute 16. *Car.* 2. c. 7. in bar; for though the accept new contract, yet it ſtands on the former conſideration plea ſhould not be good, the ſtatute would be eluded. the plaintiff had indorſed the bill over *bona fide* to anot ignorant of the iniquity, the ſtatute could not have againſt ſuch an indorſee (*c*): but ſurely it may again party to the wrong.

Judgment was given for the defendant.

(*a*) See Hedges *v.* Sandon, 2. Term Rep. 439.

(*b*) See James *v.* Fowkes, poſt. 101. Hallet *v.* Birt, poſt. 120. Harriſon *v.* Cage, poſt. 214. Paramour *v.* Johnſton, poſt. 376.

(*c*) But now by 9. *Anne*, c. 14. ſ. 1. "All notes, bills, bonds, judgments, "mortgages, or other ſecurities or con- "veyances whatſoever, given, granted, "drawn, or entered into, or executed "by any perſon, for money or other "valuable thing won by gaming, or by "betting on ſuch as do game, or for re- "imburſing or repaying any money "knowingly lent or advanced for gaming "or betting, or lent or advanced at the "time and place of play to any perſon "gaming or betting, are void." And it has been decided, that an indorſee of a promiſſory note given for money knowingly advanced by *the payee* to *the drawer* to game with, is not recoverable againſt the drawer, although th full and valuable conſider payee, and was not priv notice that the money v with, Bowyer *v.* Bampte —See alſo Lowe *v.* Wal But this ſtatute only ren as are therein mentione not deſtroy the validity money *lent to play wit* money ſo lent is recover of *aſſumpſit*, if no *ſecurity* Barjeau *v.* Walmſley, and it has been held, tha diviſible, and that if *A.* afterwards *lend* 300l. t take a note for the whole the note is void as be may recover the 300l. Robinſon *v.* Bland, 2. Bu 1. Bl. Rep. 234.—See al Hall, 2. Wilſ. 309. Jeſ 1. Wilſ. 220.

Birt *againſt* Strode.

Caſe 176.

)R OF A JUDGMENT in the court of common pleas in an on on the caſe, where the plaintiff declared, that he was *poſſeſſed* of a tenement, and that he ought to have common re in one thouſand acres, in a place called, &c. for all com- : beaſts *levant et couchant* on the tenement aforeſaid; that ndant made coneyburrows, whereby the plaintiff could not s common *in tam amplo et beneficiali modo*. The defendant :d.

In an action for diſturbance of common, it is not neceſſary for the plaintiff to ſhew *title* to the common; it is ſufficient to ſtate that he was *poſſeſſed* of a tenement, &c. and had right of common in the place WHERE, &c.

r, *Chief Juſtice*, delivered the opinion of the Court, that it ought to be affirmed, and that the declaration was good, ſetting out a title to the common, either by grant or pre- L

T, Becauſe the action is brought upon the poſſeſſion, and ed upon a wrong done upon the poſſeſſion, and not to the

* [98]

S. C. 4. Mod. 418. S. C. Skin. 621. S. C. 3. Salk. 12. S.C. Comb. 370. 3. Lev. 104. *Coo* material. Vide 1. Cro. 138. 575. 2. Cro. 43. 3. Cro. 419. 1. Vent. 274. 319. Stra. 1238. 4. Bac. Abr. 15. 5. Com. Dig. "Pleader" (C. 39.). 1. Burr. 440. Bull. N. P. 76. 3. Term Rep. 147. 767. 4. Term Rep. 719. 5. Term Rep. 46.

NDLY, It is not neceſſary that it appear whether the defen- owner of the land or not, and therefore no need of ſetting itle. But if it had appeared by pleading, that the defendant r of the land, there it is neceſſary to ſet out a title; but here ; * indifferent whether he be owner or a ſtranger; but t comes on ſpecial pleading, as in treſpaſs for taking and his cattle, if the defendant juſtifies as in his freehold, and took them damage-feaſant, there the plaintiff muſt ſhew me title in his replication, in anſwer to that of the defendant's ar. But in a declaration, where the defendant may be as ppoſed a ſtranger as an owner, there no title is neceſſary to m.

RDLY, This matter is not traverſable, for all the right of the n muſt be given in evidence upon not guilty, or elſe the cannot recover; and if ſo, it is to no purpoſe to ſet it forth leclaration; and he ſaid, the caſe principally to be relied on f *St. John v. Moody*, in HALE's time (*a*), where the plaintiff l, in an action on the caſe, that he was ſeiſed of twenty acres l, and uſed to have a way over ſuch a place to that wood, s diſturbed in it by the defendant; he ſaid, it was true the declared on a ſeiſin in fee, but that was not neceſſary, for a fee is not neceſſary to be ſet forth but where a preſcription made; and therefore a declaration on *the poſſeſſion*, where cription is made, is as good as upon *a ſeiſin* in fee: the ex- to the declaration in that caſe was taken after verdict; but ole Court were of opinion, that though there had been no ; yet the declaration had been good; and there are ſeveral ents ſince of this kind.

l the judgment was affirmed.

(*a*) Mich. Term, 27. *Car.* 2. 1. Vent. 274. 356.

Caſe 177.

The King *againſt* Granfield.

To ſay, "the "mayor and al- "dermen of *H.* "are a pack of "as great "rogues as a- "ny that rob "on the high- "way," is not indictable.

GRANFIELD was found guilty, at the ſeſſions of *Hertford*, on an indictment for ſaying, "The mayor and aldermen of *Hertford* "are a pack of as great villains as any that rob on the highway."

And having ſlipt the time of moving in arreſt of judgment, they moved to ſubmit to a ſmall fine (*a*).

PER CURIAM. We are not ſatisfied that the words are ſuch as he may be indicted for; for what is it to the Government, that the mayor, &c. are a pack of rogues (*b*)?

So they fined them ſixpence a-piece.

S. C. 5. Mod. 203. Hob. 202. Moor, 819. 1. Mod. 35. 2. Vent. 16. 2. Salk. 698. 6. Mod. 124. 2. Term Rep. 199.

(*a*) A motion in arreſt of judgment on an indictment may be made at any time before judgment is actually pronounced.

(*b*) See Rex *v.* Burford, 1. Vent. 16. Anonymous, 1. Vent. 10. Wrightſon's Caſe, 2. Salk. 698. Reg. *v.* Soley, 2. Salk. 698. Reg. *v.* Langley, 6. Mod. 124. Rex *v.* Legarley, 1. Hawk. P. C. ch. 21. ſ. 13. Rex *v.* Barker, 1. Mod. 35. Rex *v.* Revell, 1. Stra. 420. Rex *v.* Pocock, 2. Stra. 1157. Rex *v.* Darby, 3. Mod. 139.

* [99]

Caſe 178.

*The King *againſt* Bracy and Others.

Indictment for a riot *contra formam ſtatuti* is good.

INDICTMENT FOR A RIOT. An exception was taken, that the concluſion ought not to have been *contra formam ſtatuti*, it being an offence at common law.

S. C. Comb. 371.

PER CURIAM. Barratry was an offence at common law, yet it is good to conclude *contra formam diverſorum ſtat.* Stabbing was an offence at common law, and therefore a man may be indicted generally, or ſpecially, *contra formam ſtat.*; and even in an indictment on the ſtatute, the jury find it manſlaughter generally.

Therefore THE COURT refuſed to quaſh the indictment; but bid the Counſel demur, if he thought fit (*a*).

(*a*) If an indictment for an offence at common law concludes, "*againſt the form* "*of the ſtatute, &c.*" theſe words may be rejected as ſurpluſage, Rex *v.* Bathurſt, Sayer, 225. Rex *v.* Mathews, 5. Term Rep. 162.—See alſo 4. Hawk. P. C. c. 25. ſ. 115.

Caſe 179.

Williams *againſt* Batter and Others.

Two actions brought againſt a perſon, and the ſame bail in both; a *reddidit ſe* in one, a diſcharge of the bail in the other.

THE QUESTION was upon a point of practice, Whether a *reddidit ſe* upon one action, where there were two actions againſt the ſame parties, where the ſame parties were bail, ſhould be a diſcharge to the bail in the other action.

And THE COURT was of opinion, that it ſhould diſcharge the bail in the other action too; and the plaintiff's attorney having notice of it, and after taking out execution againſt the bail, the execution was diſcharged; and ordered the attorney ſhould pay ſuch coſts as the Maſter ſhould tax.

Anonymous.

Anonymous. Caſe 180.

MAN can change his attorney without leave of the urt. Attorney.

Anonymous. Caſe 181.

IS COURT, *oyer* of a deed may be demanded after imparl- *Oyer* after imparlance.

Anonymous. Caſe 182.

T, *Chief Juſtice.* Though a writ of error be a *ſuperſe-* Writ of error
as in itſelf, yet after execution begun it ſhall not hinder it, ſhall not ſtop
ſheriff may go on, and on a *fieri facias* ſell the goods. execution begun.

30. 1. Salk 321. 1. Burr. 340. 1. Term Rep. 280. 2. Stra. 1186. 631. Tidd's Pract. 2. Term Rep. 45.

MICHAELMAS TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 183.

* Truelock *againſt* Hartfield.

Adminiſtration pleaded to be granted by *A. Officiál. Decani Sarum, iſtius loci ordinar. cui adminiſtratio de jure pertinuit*, without ſaying, *ad tunc, et quomodo conſtitut.* good.—S. C. Comy. Rep. 17. 1. Show. 355. Salk. 40. 2. Mod. 65. 4. Mod. 133. 6. Mod. 231. 1. Ld. Ray. 635.

DEBT ON A BOND as adminiſtrator. The plaintiff in his count ſays, that adminiſtration was committed to him "*per J. S. Official. Decani Sarum loci illius ordinar. legitimè conſtitut. cui adminiſtratio de jure pertinuit*," without ſaying "*adtunc pertinuit*;" he does not ſay, "*coment conſtitut.*;" and held good notwithſtanding.

Caſe 184.

Dixon *againſt* Willows.

Money. S. C. Salk. 446. S. C. Comb. 387. S. C. 3. Salk. 239. S. C. Holt, 471.

HOLT, *Chief Juſtice.* Guineas are coined at the king's mint for *twenty ſhillings*, and at that rate are lawful money of *England* without any proclamation for their currency: the indenture between the king and maſter of the mint are ſufficient.

Poph. 28. Cro. Car. 515. Palm. 407. 5. Mod. 6. 1. Salk. 9. 22.

Caſe 185.

Hicks *againſt* Dowling.

Caſe, for negligently keeping his fire, lies for leſſee againſt his under-leſſee. 3. Lev. 359.

ACTION UPON THE CASE for negligently keeping his fire, by a leſſee againſt an under-leſſee.—S. C. 1. Salk. 13. S. C. 1. Ld. Ray. 99. S. C. 3. Ld. Ray. 158.

Pm

:URIAM. It lies, becauſe the leſſee is anſwerable over to (*a*).

Hicks *againſt* Dowling.

he caſe of Jermey *v.* Lowgar, 1461. Counteſs of Salop *v.* Cro. Eliz. 777. 784. Paulain *v.* Iſham, 1. Salk. 19.; and 10. *Anne*, c. 14. ſ. 1.

* Lee *againſt* Brace.

Caſe 186.

PASS AND EJECTMENT. Special verdict, That *Walter* ee, being ſeiſed in fee of the lands in queſtion, did enfeoff ee, to the uſe of the feoffor for life; and after his deceaſe, of *T. Brace* his ſon, and his heirs for ever; and for want f his body, to the right heir of the feoffor.

Conveyance by way of uſe to be conſtrued according to the intent.

S.C. 5. Mod. 266. S.C. Carth. 343. S. C. Ld. Ray. 101. S.C. 3. Salk. 337. S. C. Holt, 668. S. C. Sayer, 68. Plowd. 541. Cro. Car. 265. 3. Lev. 70. 8. Mod. 23. 2. Salk. 734. 1. Peer. Wms. 199. 432. 563. Cowp. 234. 410.

HE QUESTION was, Whether *T. B.* had a fee or a tail?

r HOLT, *Chief Juſtice*, The intention of the party is to a tail; and that contradicts no rule of law; for the law he word "heirs" to make a fee-tail as well as a fee-ſimple; enerality of thoſe words may be qualified by ſubſequent d the words "for default of ſuch iſſue" ſhew what heirs ed, as much as if he had ſaid, "to one and his heirs, *to wit*, rs of his body."

ient that it is only an eſtate-tail.

James *againſt* Fowks.

Caſe 187.

MPSIT AGAINST A WOMAN, who pleads coverture *bart premiſſionum*. The plaintiff demurs, becauſe it to the general iſſue.

Matter of law which amounts to the general iſſue may be pleaded or given in evidence.

:URIAM. Where it is matter of law that amounts to the ſue, it may be pleaded, and is no cauſe of demurrer; for law in that caſe is matter of fact, which avoids the action, ay be pleaded or given in evidence as the defendant).

S. C. 1. Ld. Ray. 89. *notis.*

Huſſey *v.* Jacob, ante, 96. rt, poſt. 120. Cage, poſt. 214. Harriſon *v.* Paramour *v.* Johnſton, poſt. 376.

Fuller *againſt* Smith.

Caſe 188.

R from the court of common pleas in an action of trover ſt ten, wherein the plaintiff declares of a finding by ten, verſion by nine, and judgment againſt all ten.

Trover againſt *ten*, declaring of a converſion by *nine*, and judgment againſt *ten*, is erroneous.

:URIAM. The converſion is the *git* of the action; for if d goods, it is lawful for him to take them; wherefore it certainly error. But if you get it amended in the common will get it amended here.

Blackhall

Caſe 189.

* Blackhall *againſt* Eccles.

If, in treſpaſs for aſſault, a time be laid in the declaration which was after the verdict, it is cured by the verdict.

S. C. 2. Salk. 662. S. C. 3. Salk. 8. S. C. Carth. 389. S. C. Com. Rep. 12. S. C. 5. Mod. 286. Yelv. 94. 3. Burr. 1729. 1. Bac. Abr. 192. 5. Bac. Abr. 214. 317. 5. Com. Dig. "Pleader" (C. 19.). Bull. N. P. 86. Dougl. 681.

TRESPASS FOR ASSAULT AND BATTERY, and declares for a battery *on the firſt day of February, in the eighth year of the new king,*" which is not yet come.

And this was MOVED *in arreſt of judgment.*

NORTHEY *for the plaintiff* acknowledged, that if the time in the declaration had been after the bill filed, and before the trial, the judgment muſt be arreſted, becauſe then it would have appeared that the jury gave damages for an action ariſing ſince the ſuit commenced; but in this caſe, the time being after the trial, it is as if there were no time at all, it being impoſſible, and therefore holpen after verdict. The caſe of *Sorrell v. Lewin* (*a*) is the ſame with this, where an *aſſumpſit* was laid of a time not come.

PER CURIAM. The day alledged is no day at all; the time is but a circumſtance (*b*); and therefore

Judgment was given for the plaintiff.

(*a*) Mich. Term, 26. *Car.* 2.
(*b*) See Hoard *v.* Tennſon, ante, 92. Wall *v.* Dukes, poſt. 105.

Caſe 190.

Duncomb *againſt* Church.

If it appear in pleading, that a privileged perſon is actually in cuſtody, he cannot have it.

S. C. Salk. 1. S. C. Comb. 390. S. C. Holt, 588. S. C. 1. Ld. Ray 93. 7. Mod. 105.

HOLT, *Chief Juſtice.* A privileged perſon in the common pleas may be in cuſtody of the marſhal; for he may either waive or miſplead his privilege; and if he be actually in cuſtody, and it appear ſo by pleading, he cannot have his privilege: and if one plead an exempt juriſdiction from all the courts of *Weſtminſter*, and not to be ſued but in ſuch particular courts and franchiſes, there you muſt ſhew that they have a juriſdiction of the matter, and that the cauſe ariſes within their juriſdiction.

Poſtea, Hil. 8. *Will.* 3. Bands *v.* Bodiner; and Stones *v.* Bodiner.

Caſe 191.

Anonymous.

Imparlance.

SPECIAL IMPARLANCE ſhould not be allowed without the leave of the Court, or conſent of parties.

Caſe 192.

The King *againſt* Keat.

Bail not allowed in manſlaughter till clergy had.

S. C. 5. Mod. 287. S. C. 1. Salk. 47. S. C. Comb. 406. S. C. Skin. 666. S. C. Holt, 481. S. C. 3. Salk. 191. 1. Salk. 103. 1. Vent. 93.

THE COURT refuſed to bail him, he being found guilty of *manſlaughter*, for that they could not bail him until clergy had, according to *Buckler's Caſe* (*a*).

(*a*) Stiles, 467.—See alſo Armſtrong *v.* Liſle, poſt. 208.

Brent

* Brent *againſt* Sir Henry Edwin. Caſe 193.

PLEA of "*non aſſumpſit infra ſex annos*" is a ſpecial Pleading.
ie.

Oldham *againſt* Pickering. Caſe 194.

ACHMENT UPON PROHIBITION. The caſe was: Eſtate *pur autre vie* is only aſſets in reſpect of creditors, and not chargeable with legacies, unleſs thereout expreſsly given; and the executor or adminiſtrator, if no debts, will be occupant, and not diſtributable.
). *Oldham* was ſeiſed of a meſſuage to him and his aſſigns lives; dies inteſtate without children, having only *Anne* g his ſiſter. Adminiſtration was committed to *Sarah* the plaintiff, whom the defendant ſued in the ſpiritual court bution.

ingle queſtion was, Whether an eſtate *pur autre vie* be ributable in the ſame manner as an inteſtate's goods and according to 22. *Car.* 2. c. . by force of 29. *Car.* 2. c. 3. it is enacted, "That an eſtate *pur autre vie* ſhall be de-; and if no ſuch deviſe be thereof made, the eſtate ſhall be rable in the hands of the heir, if it ſhall come to him by rea- a ſpecial occupancy; and in caſe there be no ſpecial occu- t ſhall go to the executor or adminiſtrator of the parties that e eſtate thereof by virtue of the grant, and ſhall be aſſets in ands?"

djudged, *per* HOLT, *Chief Juſtice*, ROKEBY, TURTON, RE, *Juſtices*, That the prohibition ſhould ſtand, and that *pur autre vie* of an inteſtate was not diſtributable; for tanding this alteration by the ſtatute, it remains a freehold d the amendment of the law in this particular was only for relief of creditors, that if it came to the heir by reaſon of ccupancy, it ſhall be in his hands as aſſets by deſcent, that to thoſe debts where the heir is chargeable, and thoſe only; re was no ſpecial occupant, then it ſhall go to the execu- dminiſtrators, and they ſhall be in the room of the occu- l it ſhall be aſſets in their hands for the payment of debts; not aſſets to pay legacies, except ſuch as are particularly ut of it, the ſtatute only having made it aſſets for a particular pay creditors: ſo as no debts appearing in this caſe, the ator is as it were the occupant, and ſhall not be compelled diſtribution (*a*).

S. C. 2. Salk. 464.
S.C. Carth. 376.
S.C. Comb. 388.
475.
S. C. 3. Salk. 237.
S. C. Holt, 503.
S. C. 1. Ld. Ray. 96.
1. Salk. 415.

14. *Geo.* 2. c. 20. reciting c. 3. and that doubts had ari- no deviſe has been made of *autre vie*, to whom the ſurplus es, after the debts of ſuch de- rs thereof are fully ſatisfied, ; IT IS ENACTED, "that e *pur autre vie*, in caſe there *ſuch occupant* thereof, of which "no deviſe ſhall have been made accord- "ing to the 29. *Car.* 2. c. 3. or ſo much "thereof as ſhall not have been ſo deviſed, "ſhall go, be applied, and diſtributed, "in the ſame manner as the perſonal "eſtate of the teſtator or inteſtate." —See Witter *v.* Witter, 3. Peer. Wms. 102. and Duke of Devon *v.* Atkins, 2. Peer. Wms. 382.

Nelſon

Caſe 195.

* Nelſon *againſt* Hawkins, Dean of Chicheſter.

Calling a clergyman "knave" not ſuable in the ſpiritual court.

S. C. 1. Ld. Ray. 423. S. C. Com. Rep. 25. S. C. Holt, 593. 2. Inſt. 492. 4. Co. 20. 7. Co. 44. Cro. Car. 110. 2. Roll. Abr. 296, 297. 3. Lev. 17. Lutw. 1054. 1. Sid. 393. Stra. 471. 545. 287. 555. 6. Com. Dig. 8vo. 132.

ATTACHMENT UPON PROHIBITION. In this caſe the plaintiff declared, that the defendant libelled againſt him in the ſpiritual court, for calling him "knave."

Whereon the defendant demurred.

HOLT, *Chief Juſtice.* It will be hard to grant *a conſultation*; the party has not accuſed THE DEAN of any diſhoneſty in his profeſſion, which may make him liable to eccleſiaſtical cenſures; if he had ſo done, it would have been reaſonable to let him ſue there; but now the caſe is only, whether we muſt be more tender of the reputation of a clergyman than that of another man; for which there is no reaſon (*a*). The reaſon why laying violent hands on a clergyman in the eccleſiaſtical court was puniſhed by excommunication was, becauſe he having *habitum et tonſuram*, by which he was known to be ſuch, an aſſault on him was deemed an aſſault to the whole clergy, and ſo a kind of ſpiritual offence.

And in *Hilary Term* THE COURT gave judgment *quòd fiat prohibitio.*

(*a*) See Coxeter *v.* Parſon, poſt. 231.

Caſe 196.

Lindſey *againſt* Clerk.

Capiatur taken away in treſpaſs.

S. C. 5. Mod. 285. S. C. 1. Salk. 54. S. C. Carth. 390. 3. Bl. Com. 398, 399.

THE COURT. The *capiatur* in treſpaſs is wholly taken away by the ſtatute 5. & 6. *Will. & Mary*, c. 12.; therefore the judgment now ſhould be entered, omitting *quòd capiatur.*

Caſe 197.

The King *againſt* Gluff.

Where a ſtatute preſcribes, that a thing ſhall be by bill, plaint, or information, it cannot be by indictment.

4. Inſt. 165.

INDICTMENT before commiſſioners of *oyer* and *terminer* THE OLD BAILEY, and removed on *certiorari.*

The indictment was on the 1. & 2. *Phil. & Mary*, c. 7. for ſelling haberdaſhers wares contrary to the ſtatute, on pain of forfeiture, one moiety to the king, the other to him that will ſue for the ſame "in any of the king's courts of record, by bill, plaint, "information, or otherwiſe."

NORTHEY moved to quaſh it, on the authority of *Gregory's Caſe* (*a*) and the caſe of *Farrington v. Keymer* (*b*), becauſe the general words, "of the king's courts of records," extend only to thoſe of *Weſtminſter.*

PER CURIAM. It is true, the juſtices of peace cannot hereby have juriſdiction; but it has been ruled ſince *Gregory's Caſe*, that

(*a*) 6. Co. 19. b. (*b*) 1. Cro. 112.

juſtices

THE KING *against* GLOVER.

oyer and *terminer* may by way of INDICTMENT, * but ıy of INFORMATION, and therefore in that reſpect it is h; but here the ſtatute has preſcribed a particular way overy of the forfeiture, *viz.* "by action of debt, inform- tc." without ſaying anything of "indictment;" and : is a queſtion, whether this be indictable or no?

ich reaſon let it be quaſhed *niſi* (*a*).

: a ſtatute creates a new appoints certain particular which an *indictment* is not icular remedies appointed by n alone be purſued, Rex *v.* K. B. 127. 2. Seſſ. Caſes, rhere new-created offences ibited by a general prohibit- a indictment will lie, Rex *v.* Wright, 1. Burr. 544. although there be afterwards a particular proviſion and a particular remedy given, Rex *v.* Robinſon, 2. Burr. 803.—See alſo Rex *v.* Balure, Cowp. 650. Rex *v.* Davis, Sayer, 133. Rex *v.* Boyal, 2. Burr. 832. Rex *v.* Harris, 4. Term Rep. 202. and the note to Rex *v.* Marriot, 4. Mod. 144. 1. Show. 398.

Wall *againſt* Dukes. Caſe 198.

'ASS. After a verdict for the plaintiff it was moved in t of judgment, becauſe the treſpaſs was only laid to be *ebus et vicibus*, without laying any particular time.

Laying no particular time in treſpaſs cured by verdict.

URIAM. It is well enough after verdict, on the ſame th the caſe of *Blackhall v. Eccles* (*a*) this Term.

(*a*) Ante, 102.

Anonymous. Caſe 199.

', *Chief Juſtice.* An *audita querela* is no *ſuperſedeas* in ; being not like a *writ of error*; but the party may go on execution until there be a ſpecial *ſuperſedeas*; and though *querela* be allowed, no *ſuperſedeas* ſhall be granted until r whereupon the *audita querela* is grounded be proved by eſſes.

Audita querela is no *ſuperſedeas* until there be a ſpecial *ſuperſedeas*.

Hartop *againſt* Holt. Caſe 200.

MENT was given in debt in this court, and affirmed in a of error in the exchequer-chamber, and ſent back hither. es out a *ſcire facias* why execution ſhould not be awarded dgment, and thereupon execution is awarded; and after- t brings a writ of error *tam in redditione judicii, quàm in ione executionis*, returnable in the exchequer-chamber; tanding which the plaintiff takes out execution.

Error will not lie in the exchequer-chamber, on *ſcire facias* to execute a judgment which had been affirmed in the exchequer-chamber.

queſtion was, Whether this writ of error be a *ſuperſedeas*? S. C. Salk. 263.

od 229. S. C. Comb. 293. S. C. 12. Mod. 105. S. C. 1. Ld. Ray. 97. S. C. Ray. Comb. 12. 264. 8. Mod. 121. 147. 373. Fitzg. 175. 5. Com. Dig. "Pleader" (3. B. 12.). x. 209. 4. Bac. Abr. 410.

HOLT,

HARTOP *againſt* HOLT.

HOLT, *Chief Juſtice.* It is plain, that no writ of error in this manner lies on the firſt judgment; and if ſuch a one be taken out, it is no *ſuperſedeas*, becauſe one has been brought already on the firſt judgment; and they have affirmed it, whereby they executed their authority, and have no power to examine their own judgment; ſo that ſuppoſing this writ of error to lie on the *ſcire facias*, yet it will not lie on the principal judgment, or be any *ſuperſedeas* thereunto: but then ſuppoſing it to lie on the *ſcire facias* alone, whether it would be good for that part and * void for the reſt; ſo the whole queſtion is, Whether a writ of error lies upon an award of execution in a *ſcire facias* grounded upon a judgment in the exchequer-chamber? I think this writ of error will not lie, and is no *ſuperſedeas*, becauſe it is neither within the letter nor meaning of the act, being for a matter ariſing ſince the firſt judgment, and nothing relating to the merits of that.

* [106]

Vide 1. Vent. 168, 169.

Poſtea, Hil. 8. *Will.* 3. Comers v. Manucaptors of Rawlins.

1. Cro. 143. 464.
1. Vent. 38.

Wherefore THE COURT aſſented, that no writ of error lies on this *ſcire facias*, and that execution was well taken out. *Note diverſitatem*, 1. *Vent.* 168, 169.

Caſe 201.

Byron *againſt* Emes.

Saying a woman had a *baſtard*, to hinder her of her marriage, which was then in communication with *A.* not actionable.

S. C. Comb. 391.
S. C. Salk. 693.
1. Roll. 34.
1. Sid. 396.
1. Com. Dig. 8vo. 274.

ACTION ON THE CASE for ſcandalous words, wherein the plaintiff declared, ſhe was a chaſte virgin, and of good fame; and that whereas *J. Chapman* was in communication of marriage with her, the defendant *præmiſſarum non ignarus*, to defame her, and hinder her of her marriage, ſaid of her, "What do you go to "*London* for but to drop your ſtink;" with averment, that where the words were ſpoke "ſtink" ſignifies "baſtard;" as alſo, "that "ſhe went to *London* laſt winter to lie-in, and to my knowledge "ſeveral people have lain with her." Upon iſſue joined, and verdict for the plaintiff,

IT WAS MOVED *in arreſt of judgment*, that the words are not actionable, becauſe they are of a ſpiritual conuſance, and no temporal loſs accrues; that to ſay "a woman has a baſtard" was never actionable before the ſtatute for proviſion of baſtard children; and ſince the ſtatute, it has never been held to be actionable but when the party is brought within the penalty of the ſtatute, which is only where the baſtard becomes chargeable to the pariſh. Theſe words are moſt ſcandalous of a young woman; ſo that were it *res nova*, perhaps an action would lie; but there are many authorities to the contrary. It is a crime of which the eccleſiaſtical court has conuſance, and can cenſure; and it is not reaſonable that the party ſhould be liable to defamation and an action too; on which account *Anon. Davis's Caſe* hath been often ſhaken. In this caſe, the having the baſtard is not the crime, but the fornication, of which the party is an undeniable evidence.

Judgment for the defendant (*a*).

(*a*) 1. Roll. Abr. 35. 3. Bulſt. 48. Cro. Eliz. 639. Cro. Car. 322. 1. Lev. 261. Salk. 696.

Yeoman

* Yeoman *againſt* Bradſhaw. Caſe 202.

R CURIAM. The whole queſtion is, Whether a bill of exchange ſhall draw adminiſtration to the province or dioceſe the bill is, or where the acceptor, who is obliged to pay it, Now though a bill of exchange be in writing, yet in judgof law it is of no higher nature than a ſimple contract; and ore it muſt follow the rules of debt upon ſimple contract, and iſtration is to be committed where he who pays it lives.

A bill of exchange is only a ſimple contract, and *aſſets* only where the debtor is.

S.C.Carth. 373. S. C. 3. Salk. 70. 164. S.C.Comb. 392. S. C. Holt, 42.

R CURIAM. Judgment *quòd billa caſſetur.*

White *againſt* The Biſhop of Worceſter. Caſe 203.

ESPASS AND EJECTMENT againſt ſeven defendants, who ll appeared and pleaded, and joined iſſue on the plea roll; the and *diſtringas* was againſt all ſeven, only the iſſue on the *niſi* roll was joined by five only; verdict at the aſſizes againſt ; and after ſeveral motions in arreſt of judgment,

If ejectment be againſt ſeven, who appear and plead, and iſſue be joined on the plea-roll againſt five only; and verdict againſt ſeven; the *niſi prius* roll is amendable.

WAS RESOLVED by the whole Court, that the *niſi prius* roll this caſe amendable. *Blackamore's Caſe (a)* has theſe expreſs "That the *niſi prius* roll is amendable, where the Judge has icient authority, expreſs or implied, to try the cauſe." Now here the Judge has an implied authority, for here is an iſſue on the record by all ſeven; if one iſſue had been joined by ve, and another by the other two, it had been otherwiſe. The and *diſtringas* are againſt all ſeven to try this iſſue of "not lty;" ſo that the Judge has plainly an implied authority to try iſſue between the plaintiff and the ſeven; and that omiſſion is y a miſpriſion of the clerk; and therefore ſuch a miſtake in all s and caſes is amendable, and eſpecially in this action of eject, where all ſeven are bound by rule of court to confeſs leaſe, and ouſter.

S.C. 1.Salk. 48. Comb. 393. 1. Ro. Ab. 200. Poph. 102. Yelv. 64. Cro. Car. 338. Stiles, 339. 2. Mod. 316. B. R. H. 21. Stra. 843. 1. Wilſ. 30. 1. Burr. 383. 1. Com. Dig. 8vo. 470.

(a) 8. Co. 161.

* [108]

* The King *againſt* Sir Thomas Culpeper. Caſe 204.

A TRIAL AT BAR, wherein mention is made of privilege of parliament,

Privilege of parliament does not protect a man where ſecurity of the peace is deſired. *Quæri.*

OLT, *Chief Juſtice*, ſaid, that where it is ſaid in our Books, rivilege of parliament is not allowable in *treaſon*, *felony*, or *h of the peace*, it muſt be intended, where *ſecurity of the peace* is d, that it ſhall not protect a man againſt a *ſupplicavit*; but it as well in caſe of indictments or informations for breach of as in caſe of actions.

1. Wilſ 332. Sayer, 50. 1. Burr. 631.

Caſe 205.

The King *againſt* Rainſden.

Order of juſtices to remove a man, not ſaying one of them was of the *quorum*, ill.

AN ORDER OF TWO JUSTICES to remove *Rainſden*, likely to become chargeable to the pariſh, was quaſhed, becauſe it was not ſaid, that one of them was of the *quorum* (*a*); but if it had been at the ſeſſions, it need not to have been ſaid.

(*a*) But now by 26 *Geo.* 2. c. 27. no order, &c. made by two or more juſtices which doth not expreſs that one of them is of the *quorum* ſhall be impeached for that defect only.—See alſo 7. *Ga.* 3. c. 21. and 1. Bl. Com. 351.

Caſe 206.

Armſtrong *againſt* L'Iſle.

Till clergy had, not bailable in manſlaughter.

S. C. poſt. 109. 157.

S. C. 1. Kely. 89. 93.

PER HOLT, *Chief Juſtice*. We cannot bail *L'Iſle* on a conviction of manſlaughter before clergy had (*a*), unleſs a pardon be ready to be produced *ſub pede ſigilli*, and then we may, though attainted of murder or treaſon; and ſo on a writ of error to reverſe an attainder we may bail him, and bind him to proſecute a writ of error.

S. C Trem. 20. Holt, 63. S. C. Skin. 670. S. C. Carth. 394. S. C. Comb. 410. S. C. Salk. 60. S. C.

(*a*) See S. P. Rex v. Keat, ante, 102.

HILAR

HILARY TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

* Redwood *againſt* Coward. Caſe 207.

ERROR out of THE PALACE-COURT in an action on the caſe. Palace court.

S. C. Salk. 328
S. C. 5. Mod. 323.
S. C. 1. Ld. Ray. 147.
S C. Holt, 272.
2. Saund. 96.

The error aſſigned was, that "*juratores aſſident damna*," where ſhould be "*aſſidunt.*"

THE COURT adjudged either of them well enough, though neiher of them proper.

Armſtrong *againſt* L'Iſle. Caſe 208.

APPEAL OF MURDER. The appellee was brought to THE BAR; and it was moved, that he might have his clergy, on conviction of manſlaughter, on an indictment whereon he was d laſt aſſizes for *Cumberland.* Appeal lodged againſt *A.* convicted of manſlaughter, but not proſecuted; he was bailed beforeclergyhad.

S. C. ante, 108.
S. C. poſt. 157.
S. C. 1. Kely. 89. 93.
S. C. Trem. 20.
S. C Skin. 670.
S.C. Carth. 394.
S.C. Comb. 410.
S. C. Salk. 60.
S. C. Holt, 63.

HOLT, *Chief Juſtice.* There have been reſolutions that the ges may defer the allowance of clergy to a priſoner to expoſe to an appeal. In the caſe of *Goring v. Deering* (*a*), the priwas convicted of manſlaughter, and clergy reſpited; and on ppeal brought, he pleaded all this matter; but his plea was diſved, by advice of all the Judges. I tried him on the appeal; but

(*a*)

ARMSTRONG *againſt* L'ISLE.

but I muſt confeſs I was never ſatisfied with that reſolution, being of opinion, that it is the duty of the Court to allow the priſoner his clergy the ſame aſſizes or ſeſſions wherein he is convicted. The clergy in the time of *Edward the Third* complained, that after clerks were convicted of felony the Judges delayed the giving them their clergy, on ſuggeſtion, that there were other matters againſt them; * [110] which they might do on this * account, becauſe till the twenty-third year of *Henry the Eighth* clergy was allowed in all caſes except treaſon; and if a man had his clergy once, the delivering him over to the ordinary was an abſolute diſcharge of all offences before clergy had: but notwithſtanding this reaſon, they complained thereof; whereupon 25. *Edw.* 3. c. 5. was made, which ſtands unrepealed, whereby it is enacted, "that a clerk ſhall be preſently "arraigned for all his offences, or otherwiſe delivered to the ordi-"nary;" where by the word "preſently" is meant the ſame ſeſſions or aſſizes, *i. e.* the party ſhall have his clergy the ſame ſeſſions, &c. wherein he is convicted. Now then, if by this ſtatute the party muſt have his clergy the ſame ſeſſions wherein he is convicted, and you have lodged an appeal, you may go on herewith; but if you will not go on, you muſt not delay him of his clergy. The 3. *Hen.* 7. c. 1. provides, "that *auterfoits convict* ſhall be no bar in an appeal, "unleſs clergy had;" the deſign whereof was to ſave the right of the church, by which the having of clergy was a diſcharge, not only for the offence for which he was convicted, but alſo for all other offences before; ſo that having of clergy on conviction of manſlaughter was a diſcharge of an indictment for larceny or other ſuch crime. Before the ſtatute of 18. *Eliz.* c. 7. if a man was guilty of two felonies, in one whereof he might have had his clergy, in the other not, and he had his clergy in one before he was arraigned of the other, the other was hereby diſcharged; for remedy of which that ſtatute was made. *Stone's Caſe*, in *Dyer*, 214. *b.* which is obſcurely reported, is remarkable in this caſe: *Stone* had committed two felonies, in one whereof he might have his clergy, in the other not; he was firſt indicted of the felony where clergy lay, and convicted, and had clergy, but no entry made of his being delivered to the ordinary; and the next ſeſſions he was convicted of the other felony, but judgment was reſpited; and the advice of all the queen's Judges and Serjeants was taken, whether he ſhould have judgment to be hanged, or delivered to the ordinary; but that being not done, they were divided ſeven againſt ſeven; but at length the opinion of the latter ſeven prevailed, that he ſhould not be hanged, becauſe if he had had his clergy, it would have been a diſcharge of all other felonies committed by him before that conviction; and the delay thereof being the act of the Court, ſhould not turn to his prejudice. Now I think a man, notwithſtanding his being found guilty of manſlaughter, may be appealed the ſame ſeſſions before clergy had. * [111] But, to make no determination * in this point, we are to conſider now, whether he may be bailed. *Co. Ent. tit.* "*Indictment*," Vide 1. Sid. 316. there was an indictment at the aſſizes for murder, the party found guilty of manſlaughter, the conviction removed into this court, where he was bailed.

Wherefore

herefore *per* HOLT, *Chief Juſtice*, ET TOTAM CURIAM, im be bailed; and after his clergy was allowed him, for the s before given by HOLT, *Chief Juſtice*. ARMSTRONG *againſt* L'ISLE.

Anonymous. Caſe 209.

LT, *Chief Juſtice*. If you have not regular notice of trial, et if you make defence, and do not depend on that, you cannot ard take advantage of it. Notice of trial.

Hicks *againſt* Woodiſon. Caſe 210.

FACHMENT ON A PROHIBITION, wherein the plaintiff :clared, that the hundred of *Huntſpittle* was an antient hun- ne out of mind; and that within the hundred, time out of here had been a cuſtom for all the inhabitants thereof to be l diſcharged from the payment of any tithes for the agiſtment en cattle. The defendant traverſed the cuſtom; and on iſſue a verdict was given for the plaintiff that there was ſuch a n.

A *county* or *hundred* cannot preſcribe in *non decimando* for any thing titheable of common right.

S. C. 4 Mod. 336.
S. C. 2. Salk. 655.
S C. Carth. 392.
S.C. Comb. 403.
S. C. Holt, 671.
S. C. Skin. 560.
S.C. 1. Ld. Ray. 137
S. C. Ray. Ent. 170.
F. tzg. 79.
Com. Rep. 656.
3. Com. Dig. "Diſmes" (E. 4).
5. Bac. Abr. 54.

WAS MOVED *in arreſt of judgment*, that there can be no ſuch *in non decimando* for anything but wood, becauſe that is not common right.

O IT WAS ADJUDGED, that no county or hundred can pre- in *non decimando* for anything that is titheable of common and that this preſcription is void and illegal. There is no e of ſuch preſcription, but of wood, but one, *Kidden v.* *ds* (*a*). Wood was only titheable by particular cuſtom until non of *Stradford*, in the ſeventeenth year of *Edward the* becauſe it is not annually renovant, *i. e.* not producing profit.

erefore *a conſultation* was awarded.

(*a*) 1. Roll. Abr. 654.

The King *againſt* Burdett. Caſe 211.

HE JURY eat and drink at the charge of the party for whom verdict is found, it avoids it; but if at their own charge, they y fineable (*a*). Jury.

ee Harebottle *v.* Placock, Cro. Littleton *v.* Hunkleton, Dyer, Anonymous, Dyer, 218. a. Burdett, 2. Salk. 645. S. C. 1. Ld. Ray. 148. Foſter *v.* Hawden, 2. Lev. 205.—See alſo 2. Hawk. P. C. ch. 22. ſ. 18. 3. Bac. Abr. 282. 2. Hale, 296. Bull. N. P. 308.

Anonymous. Caſe 212.

.T, *Chief Juſtice*. The ſeſſions cannot indict for petty aſon.

Caſe 213.

* Anonymous.

Miſdemeanors in bankruptcy are cognizable in the king's bench.

THOUGH the commiſſion of bankruptcy be taken out of chancery, and you muſt apply there for ſuperſeding it, yet all miſdemeanors in the executing it are conuſable here.

Caſe 214.

Coniers *againſt* The Manucaptors of Rawlins.

Bail cannotplead payment before the return of the ſecond *ſcire facias* ; for the recognizance is broken before ſuing the firſt *ſcire facias*.

Poſtea, Mich. 10. *Will.* 3. The King *v.* Moor. Mich. 13. *Will.* 3. The King *v.* Love.

SCIRE FACIAS againſt bail. They come in and plead, that before the return of the ſecond *ſcire facias* the defendant in the original action paid the money. To which the plaintiff replied; and inſtead of the defendant concluding to *the country*, an iſſue being tendered, concluded with an *hoc paratus eſt verificare*. Whereupon the plaintiff demurred.

PER CURIAM. Bail may plead payment by the principal, but it muſt be in a right manner, which is not done in this caſe, becauſe the recognizance was broke before the ſuing the firſt *ſcire facias*; and therefore pleading payment before the return of the ſecond has not the colour of a good plea.

In what caſe "*de debito*" may be rejected.

1. Cro. 464. 143. 2 Cro. 171. 1. Vent. 38. 169. Cro. Car. 300. Hob. 72.

Whereupon SHOWER urged, that the plaintiff could not have judgment, becauſe he prays execution *de debito et damnis*, wherein it ſhould have been *de damnis* only; for the recognizance in the king's bench being not in a ſum certain, there can be no debt created in the bail thereby.

PER CURIAM. We will reject "*de debito*" as ſurpluſage; wherefore let the plaintiff have judgment.

After which the defendant brought a writ of error returnable in the exchequer-chamber: but on motion the plaintiff had leave to take out execution; for no writ of error lies on a *ſcire facias* againſt bail there. *Ante*, 106.

Caſe 215.

Anonymous.

Inquiſition before a coroner, *certè credimus* ill.

SIR BARTHOLOMEW SHOWER moved to quaſh an inquiſition taken before a coroner, whereon the jury find, that a poſt in the highway was *unica cauſa movens ad mortem*; and he excepted to it, becauſe it was *nos certè credimus eſſe cauſam mortis*, whereas it ought to be certain; and therefore it was quaſhed.

Caſe 216.

Bands *againſt* Bodiner;
AND
Stone *againſt* Bodiner.

Privilege of attorney.

S.C. Carth. 377. Tidd's Pract. 76.

TROVER. The defendant pleads, that he was an attorney of the court of common pleas, and ſo pleads his privilege. The plaintiff replies, that at the time of exhibiting the bill he was in *cuſtodiâ*

BANDS *againſt* BODINER; AND STONE *againſt* BODINER.

ladii mareſch. at the ſuit of *J. S.* and that the defendant was ed out upon bail; *ſuper quo* the plea between them not being ined, the plaintiff, according to the cuſtom of this court time nind, filed his bill, as it was lawful for him to do; where- he plaintiff demurred.

Being in cuſtody of the marſhal on bail filed, unleſs in actual cuſtody, does not hinder an attorney of his privilege.

PER CURIAM, The being in cuſtody of the marſhal does der a man of his privilege. The Court indeed, in 27. *Hen.* 6. : of opinion, that if he be actually in cuſtody of the marſhal, ıot be ſued in any other court; and if he be, a *ſuperſedeas* ɔ; but this was only for the privilege of the defendant. ly privilege which the plaintiff has is juſt to ſue him while ere; but if a defendant has privilege not to be ſued there, he ve the advantage thereof. In this caſe, it does not appear t the defendant may have privilege againſt him who firſt him into cuſtody of the marſhal; and if ſo, it is ſtrange he not have it againſt the plaintiff that grafts thereupon. If he had ſubmitted himſelf in the firſt action to the juriſdiction Court, he ſhould not have his privilege in the other; but then ıſt have ſhewn it in your replication, and relied upon it as of eſtoppel; which having not done, we muſt allow pri-

Poſtea, Trin. 13. *Will.* 3. Wilbraham *v.* Lownds. Ante, 102.

Anonymous. Caſe 217.

CTMENT on a demiſe by a corporation aggregate. Ver- for the plaintiff in the court of common pleas.

By confeſſing leaſe, entry, and ouſter, the demiſe is confeſſed to be good.

ır brought; and objected, that the demiſe is not ſet forth to leed.

Cro. Jac. 166. Run. Eject. 211. 221.

ɔment affirmed; for the demiſe is confeſſed to be good by ng leaſe, entry, and ouſter; and the jury could never have or the plaintiff, if there had not been a good demiſe.

The King *againſt* Shaw. Caſe 218.

NDAMUS to reſtore *Shaw* to the place of one of the bur- ceſſes of *Wilton*; and after argument on both ſides, a peremp- *andamus* was granted, becauſe the crime for which they re- was not well alledged in the return.

Bad return to *mandamus*.

The King *againſt* Clerk. * [114] Caſe 219.

BEAS CORPUS to the keeper of *Newgate* to bring up the ody of *J. Clerk*, committed for not taking upon * himſelf ery of *the Vintners Company*.

The cuſtom of *London* to commit a freeman who refuſes to take up his *livery* is good.

THE KING *against* CLERK.

The keeper of *Newgate* returned, that the city of *London* is an antient city; and that time out of mind there have been ſeveral companies, guilds, and fraternities, within the city, among the reſt THE COMPANY OF VINTNERS, and that they had time out of mind uſed to chuſe out of the freemen certain perſons, who were to take upon them the livery of the ſaid Company; and that there has been time out of mind a court held before the mayor and aldermen of that city, which court has the government of all Companies; and that upon complaint made before them, by the maſter and wardens of any Company, of any perſon duly choſen on the livery that did refuſe, &c. that the court of aldermen uſed to commit ſuch perſons ſo refuſing to the ſheriff, or ſome other officer of the city, *quouſque conſentiret et declararet* that he would take upon himſelf the ſaid office, or otherwiſe be diſcharged by due courſe of law: that *Clerk* was duly choſen a liveryman, &c. and that the court of aldermen, by a warrant in writing, did commit him to me, the ſaid keeper of *Newgate*, *quouſque*, &c.

PER TOTAM CURIAM. The cuſtom is good.

A commitment by the court of aldermen, returned to be "to the keeper "of *Newgate*," is not good, without ſaying that he was an officer of the city. Arte, 75. S. C. Comb. 411. S. C. 5 Mod. 319. S. C. Salk. 349. S. C. 3. Salk. 92. 1. Bac. Ab. 611. Vide poſtea, Paſch. 13. Will. 3 Wilmot v. Tiler. 681.

But becauſe it did not appear on the return, that the keeper of *Newgate* was an officer of the City, to which the commitment muſt be, according to the cuſtom, therefore he was diſcharged.

And HOLT, *Chief Juſtice*, took this diverſity, that where it appears that the perſon to whom the commitment was made was an officer of the court, as the marſhal here, or the ſheriff, in caſe of commitment by juſtices of *oyer* and *terminer*, there needs no averment of ſuch a perſon to be a proper officer; but here it does not appear, that the keeper of *Newgate* is a proper officer for the city of *London*, attendant on that court: we know the ſheriffs of *London* are keepers of *Newgate*, and that all perſons in the cuſtody of the keeper of *Newgate* are in the cuſtody of the ſheriffs; but we cannot judicially take notice of it. So on the ſtatute of Recuſants, which forbids a recuſant convict to come within five miles of *London*, which ſends members to parliament, and the commitment was for coming within five miles of *London*, and it not appearing that *London* ſent members to parliament on the return, the return was ill, and the party diſcharged, though every one knows *London* does ſend members to parliament.

Caſe 220.

* The King *againſt* Bernard.

Conſtables at common law are to be elected in the leet, and in default thereof at the ſheriff's tourn; but by cuſtom a corporation may elect them, but that muſt be by cuſtom, which muſt be ſpecially ſhewn — S. C. Salk. 562. S. C. Skin. 669. S. C. Comb. 416. S. C. Holt, 452. S. C. Sett. & Rem. 214. S. C. 1. Ld. Ray. 94. 1. Mod. 13. Poſt. 1180. Stra. 798. 1050. 1149. 1213. 1. Bac. Abr. 439. Dougl 536. 3. Hawk. P. C. ch. 10. ſ. 49.

INDICTMENT at the ſeſſions of the town of *Southampton*. That at the general quarter-ſeſſions for the town and county of *Southampton*, *Thomas Bernard*, of the city, grocer, then and there reſident, was, by the mayor, bailiffs, and burgeſſes of the ſaid town, *debito modo ſecundum conſuetudinem villæ electus* to be conſtable for

e year enſuing, whereof he had notice the fourth of *October*, and *hunc et ibidem requiſitus fuit*, by two juſtices of the peace, *ad præ-ud. ſacramentum officii ſui prædicti*; but that he, not minding his ty, *prædicto quarto die Octob. uſque ad diem exhibitionis hujus billæ*, ſtinately refuſed to take upon himſelf the ſaid office. THE KING *againſt* BERNARD.

The defendant demurred.

FIRST, Becauſe by common law conſtables were only choſen leets, and in default of them at the tourn; and if there be a cuſtom a corporation to chuſe them otherwiſe, it muſt be averred that y had ſuch a cuſtom immemorial, it not being ſufficient to ſay, *ito modo ſecund. conſuetudinem.*

SECONDLY, Suppoſing ſuch a cuſtom in a corporation to chuſe m otherwiſe, it can only bind the members, and not others; and refore they ſhould have averred *Bernard* to have been a mem-

THIRDLY, Suppoſing him to be duly elected, it does not appear : that he took upon him the office; for notice of his election and uiring to take on him the office was on the fourth of *October*, l the refuſing is laid to be on the *quarto die Octobr.* too.

PER CURIAM. The laſt objection is material; for he might re taken the oath the fourth of *October*, which would have been aſſumption of the office, after which he is only indictable for a cial neglect, *i. e.* the neglect muſt be ſpecially laid. As for IE SECOND: Suppoſing ſuch a cuſtom within a corporation, they y without doubt not only meddle with their own members, but o with the reſiants within their precincts. But THE FIRST is oſt conſiderable. At common law they were elected at the leets, d in default at the ſheriff's tourn, the leet of the county. But r cuſtom, a corporation might chuſe its own officers; and this ſtom is reaſonable; becauſe when an incorporate town has the vernment thereof committed to them, it is but reaſonable they ould chuſe their officers that are neceſſary to ſecure the public ace; but then it ſhould have been particularly ſet forth, which is t done here. Vide 8. Co. 38. a.

Judgment was therefore given for the defendant,

* [116]

* The King *againſt* Morgan Rees. Caſe 221.

MANDAMUS to the archdeacon of *Cardigan* to ſwear *Morgan Rees* churchwarden, ſetting forth a cuſtom therein by the riſh to chuſe a churchwarden, and that according to the cuſtom y had choſen, &c.

Churchwarden choſen by the pariſh cannot be refuſed; and being appointed by the pariſh, that is anſwerable for him.

The archdeacon returned, that they had ſuch a cuſtom, and that *ſi* was lawfully choſen; but that it was proved in the archdea-

1. Salk. 90. S. C. 5. Mod. 325. S. C. Comb. 417. S. C. Carth. 393. S. C. Sett. & Rem. 1. S. C. 1. Ld. Ray. 138. 3. Mod. 333. 1. Bl. Rep. 28. 3. Burr. 1420. 3. Bac. Abr. 531.

con's

THE KING *againſt* MORGAN REES.

con's court, that he was a poor dairy-man and ſervant, and that he had no real eſtate or perſonal one, and was unfit for the office, and that therefore they diſcharged him; and then he certifies to the Court, that being *pauper lactarius et ſervus*, and *minus habilis & idoneus ad exequendum officium præd.* he could not ſwear him.

And PER CURIAM, A peremptory *mandamus* was granted.

HOLT, *Chief Juſtice*, He is a temporal officer, and the goods of his pariſh are in his cuſtody, and he may have treſpaſs for them; and they are by law a corporation. The pariſhioners may truſt whom they pleaſe, though he be inſolvent, but it is at their peril. The canon ſays, "the miniſter ſhall chuſe one;" that is only by cuſtom where they have ſo done; and the canon only confirms that antient uſage, and that was at firſt by ſome compoſition.

Caſe 222.

Anonymous.

Marſhalſea court.

PER HOLT, *Chief Juſtice*. If a record comes here out of the *Marſhalſea*, you cannot have execution larger than the *Marſhalſea*; but if by writ of error, you may have execution, on the affirmance of the judgment, all over *England*.

Caſe 223.

Hooper *againſt* Pierce.

Award of all matters to the time of the award good.

S.C.Comb. 418.

DEBT UPON A BOND to ſtand to the award of two, and if they could not agree, to nominate an umpire; and the ſubmiſſion was "of all actions, ſuits, and demands," to the time of ſubmiſſion. The defendant pleaded "no award" made; the plaintiff in his replication ſets forth an award made by the umpire, *viz.* that they ſhould mutually releaſe all demands to each other to the time of umpirage, and aſſigns a breach. The defendant demurs.

And it was objected, that this award was void, becauſe releaſes are appointed to be made of a time out of the ſubmiſſion.

SED PER CURIAM, Though antiently ſuch an opinion might have * obtained, yet for a long time ſuch an award has been held good; and that for two reaſons: FIRST, It ſhall not be intended, unleſs the contrary be ſhewn, that any other matter aroſe between the ſubmiſſion and the making the award; and if no matter did ariſe, the arbitrator has awarded no more than he ſhould do. And ſince that, a ſecond reaſon has been added, that ſuppoſing other matters to have ariſen, yet as to that the award is void, the general words being to be expounded of "all matters in controverſy at the "time of the ſubmiſſion," and as to other matters ariſing ſince to be void; and if in ſuch caſe the party ſubmitting to the award ſhould make a releaſe to the time of the ſubmiſſion, it would be a good performance of the award.

* [117]

Ante, 8.

Judgment was given for the plaintiff.

The

The King *againſt* Tumock. Caſe 224.

TMENT FOR AN OFFENCE "*ad generalem ſeſſionem*," at ſaying "*generalem quarterialem*," in a caſe where the ppoints it to be at the *general quarter ſeſſions*; and

Where a ſtatute appoints an indictment to be at a *general quarter ſeſſion* an indictment at a *general ſeſſion* is ill.

The King *againſt* The Earl of Aileſbury. Caſe 225.

EARL OF AILESBURY moved to be bailed, and ſeveral ons urged by Counſel.

Perſon bailed by the diſcretionary power of the court.

ey bailed him by virtue of the diſcretionary power which t has, without any regard to its being in or out of the *Corpus* Act, but conſidering the length of his impriſonment, oſition of body (*a*), and that *Goodman*, who was ſworn to rial evidence againſt him, was here in *England* ſeveral fter my Lord's impriſonment, and that during all that time either indicted nor proſecuted (*b*).

S. C. Comb. 421. S. C. Salk. 103. S. C. Holt, 84. Vide ante, 66.

Elizabeth Smallridge's Caſe, 356. William de Walter's Lit. 289. a. Ellen Allott's o. 126. Herbert *v.* Vaug- , 12. Harvey of Coomb's Caſe, 10. Mod. 534. Rex *v.* Rudd, Cowp. 333.

(*b*) Rex *v.* Bell and his Wife, Andr, 65.

Gale *againſt* Ewer. Caſe 226.

, BY A PARSON in the ſpiritual court on the ſtatute of *dw.* 6. for not ſetting forth of tithes, conſiſting of various and the defendant not appearing, he was * excommuni- it.

A parishioner is not bound to give notice of the ſetting-out of his tithes.

ow he prayed *a prohibition*, becauſe one of the articles was iving notice of the ſetting out of tithes.

* [118]

S. C. Com. Rep. 22. 2. Ven. 42. Comb. 128. Carter, 143. 3. Burn's E. L. 475. 3. Burr. 1893. 3. Com. Dig. "Diſmes" (L).

URIAM. Let it go; becauſe a pariſhioner is not bound, common law or ſtatute, to give the parſon notice of the rth (*a*).

went *quoad extraponendo decimas*.

Butter *v.* Heathby, 3. Burr. 1893. (*a*) *cuſtom* "that notice ſhould to the owner of the tithes of "the ſetting them out" is a good cuſtom.

The King *againſt* Keat. Caſe 227.

ave conſidered of the fact and the whole record; and as to indictment on the ſtatute of Stabbing, that is apparently for the indictment is, that he drew his ſword and ſtabbed

Indictment for murder, he not having firſt ſtruck, without S. C. Skin. 666.

ing of a weapon drawn, ill.—S. C. Salk. 47. 103. S. C. Comb. 406. 82. S. C. 5. Mod. 287. S. C. 1. Ld. Ray. 138. 3 Bac. Abr. 567. 671. 4. Bl. Com. 198.

James

THE KING *againſt* KEAT.

James Wells, he not having firſt ſtruck, without ſaying anything of a weapon drawn, and concludes *contra formam ſtatuti*; for which reaſon let it be quaſhed.

Then as to the indictment of murder at common law, it is nonſenſe in the beginning; for it ſays, "that the ſaid *J. K.* made "an aſſault on *James Wells*, and the ſaid *J. Keat præfat. Jacobum* "*Wells* with a certain ſword of the value of five ſhillings, which "he the ſaid *J. K.* in his right hand had and held, *præfat. Jacobum* "*Wells pupugit et percuſſit*;" wherein there is a *præfat. Jacobum Wells* too much, and ſo is nonſenſe.

Then there is another thing which is very odd, though it may not be error, becauſe it may poſſibly be a ſufficient deſcription; the indictment ſays, he gave him a mortal wound *latitudinis unius pollicis*, and *profunditatis in et per corpus*.

Let it be quaſhed.

And he was bailed to appear at the next general gaol-delivery for the county of *Wilts*.

EASTER

EASTER TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 228.

* The King *againſt* Greenvelt.

Where a crime is pardoned, all the effects and conſequences thereof are alſo diſcharged.

S.C. 1. Ld. Ray. 252. 5. Co. 47. 6. Co. 13. Dyer, 249.

MOTION to diſcharge *Dr. Greenvelt*, committed by the cenſor of the *College of Phyſicians pro malâ praxi* in the year 1692, chiefly becauſe this offence is pardoned by ɔ general acts of pardon ſince.

THE COUNSEL *for the College* inſiſted, that though a general don pardoned all public offences, yet it did not releaſe any pri- e right; that this penalty *pro malâ praxi* was not only a public liction, but alſo a ſatisfaction in part to the party. But ſuppoſe were only a public puniſhment, the king having granted the es to the College, he could not by the pardon deſtroy his n grant; and therefore that theſe fines remain notwithſtand-

But PER CURIAM *ſeriatim*, The penalty *pro malâ praxi* is ly a ſatisfaction to the public juſtice, and not to the party who d his action on the caſe; and that whenever a crime is pardoned, the effects and conſequences thereof are diſcharged (*a*): that hen an act of parliament appoints a fine for a public offence, ch fines of common right belong to the king, unleſs they are

(*a*) See Cuddington *v.* Wilkins, Hob. Rex *v.* Croſby, 5. Mod. 16. and Thomas Reilley's Caſe, Caſes in Crown Law, 2d edit. 360.

otherwiſe

THE KING *againſt* GREENVELT.

otherwiſe particularly diſpoſed; that the king, by granting away his fines, does not extinguiſh his power of pardoning, for that would be an extinguiſhment of his prerogative by implication; and the power of pardoning being inſeparably annexed to the crown, and not grantable over, the king therefore pardoning this offence before the fine actually impoſed, whereby an intereſt would have veſted in the grantee, the offence was thereby gone, and thereby the penalty depending thereon diſcharged.

The priſoner was diſcharged.

*[120]

Caſe 229.

*Reynolds *againſt* Gray.

Award by an umpire before the time of the arbitrators is expired, is void.

S. C. 1. Salk. 70. S. C. Sayer, 222. S. C. 1. Ld. Ray. 222.

MOTION for *an attachment* againſt the defendant for refuſing to perform an award by an umpire, on a ſubmiſſion by rule of court, which after ſome diſpute was referred.

It was held, and agreed PER CURIAM, that if the ſubmiſſion be to refer the matter in controverſy to arbitrators, and if they do not make an award by ſuch a day, that they ſhall make an umpire; that there the arbitrators cannot chuſe an umpire until the day be paſt for the making their award (*a*); and when they have choſen one generally, they cannot afterward chuſe another, becauſe they have executed their authority; but if they chuſe him on condition that he will accept it, and he refuſe, they may chuſe another, becauſe they never executed their authority (*b*).

(*a*) But ſee Wood *v.* Doe, 2. Term Rep. 644. *contra.*

(*b*) Michel *v.* Harris, poſt. 512. S. C. Salk. 71. S. C. 1. Ld. Ray. 671. —But ſee Chace *v.* Dare, T. Jones, 168. Cowell *v.* Waller, 2. Bar. K. B. 196. Bardel *v.* Harris, Freem. 378. Adam's Caſe, 2. Mod. 169. Tripoet *v.* Eyre, 3. Lev. 236. and Mr. Kyd's Treatiſe on the Law of Awards, 46. 58.

Caſe 230.

Hallett *againſt* Birt.

Hundred court can only grant replevins in court, though doubtful whether they can do it there.

S. C. 5. Mod. 252. S. C. 1. Salk. 394. S. C. 2. Salk. 580. S. C. 3. Salk. 272. S. C. Carth. 380. S. C. Skin. 674. S. C. 1. Ld. Ray. 218.

TRESPASS for taking his cattle at *Bemiſter*, in *Glouceſterſhire*.

The defendant pleads "not guilty" as to all but three cows, and as to them he pleads, that the hundred of *Bemiſter* is an antient hundred, and that long before the treſpaſs committed *the Biſhop of S.* was ſeiſed in fee, in right of his biſhoprick, of the ſaid hundred; and that he and all his predeceſſors, and thoſe whoſe eſtate he hath, had time out of mind a court therein for all perſonal actions under forty ſhillings, and of replevins in the hundred, to be held before the ſuitors thereof from three weeks to three weeks; and that time out of mind the biſhop and all thoſe, &c. or their ſtewards, on plaint made to them, or their ſtewards, in the ſaid court, or *out of court* within the hundred, of any unjuſt taking and detention within the ſaid hundred, have uſed to make deliverance thereof: that *the Biſhop of S.* conveyed the ſaid hundred to *C. W. Eſq.* who made *H. S.* his ſteward; and that after this the plaintiff *cepit et imparcavit*

three cows of one *A.* who thereupon complained to *H. S.* nding pledges *de proſequend. et returno habend. H. S* by a warrant under his ſeal, directed to the bailiff of the hundred *niſter* and the defendant, commanded them to take and the ſaid cows; by virtue whereof he took and carried them which is the ſame treſpaſs; ABSQUE HOC, that he is * guilty * [121] *aut alio modo.*

HALLETT *againſt* BIRT.

plaintiff demurred, ſhewing for cauſe, that it amounted to neral iſſue.

PER CURIAM, It does amount to it. As to ſpecial g, we take this rule, that wherever the defendant ſhews a f action in the plaintiff, either expreſs or implied, and con- nd avoids it, it is a good plea; for by confeſſion and voidance, he confeſſes the plaintiff has cauſe of action againſt were it not for ſome ſpecial matter in law; by which is not a queſtion in law, but a thing which in law avoids the cauſe n, as ſale in market overt, and without leaving a cauſe of it will amount to the general iſſue; and this is the reaſon of Now here the defendant has ſhewed, that the cattle were plaintiff's, but that he took the cattle of a ſtranger, and *avit*, whereby they were *in cuſtodiâ legis*; whereas if he had *bit et detinuit*, it might have been probably well enough. ſuppoſe the hundred-court might hold plea of replevin, is hard to imagine, yet it muſt be as a court. The ſheriff, the ſtatute of *Marlbridge*, could not grant a replevin out of much leſs a hundred-court, or court baron; and that enables e ſheriff to replevy out of court; and how can a thing be on a preſcription which had its original by act of parlia-

Aſte, 97. 163. Poſtea, Mich. 10 *Will.* 3. Harriſon v. Cage and his Wife. Paſch. 12. *Will.* 3. Paramour v. Johnſon.

gment was given for the plaintiff.

The Duke of Norfolk *againſt* Alderton. Caſe 231.

NDALUM MAGNATUM laid in *Middleſex*, and motion de for changing *the venue* on a common affidavit.

The Court will not change *the venue* in *ſcan. mag.*

THE COURT refuſed it, and ſaid they would not, unleſs pecial reaſons (*a*).

S. C. 2. Salk. 668.

S. C. Carth. 400. S. C. 1. Lev. 56.

e Steer v. Shalcroſt, Holt, 177. o. Lord Griffin v. Buckley, 482. Lady Falconbridge v. Forreſt, 2. Stra. 807. and Tidd's Practice, 359.

Caſe 232.

Bennet *againſt* Talboys.

Declaration *contra formam ſtatuti*, where ſome things are within the ſtatute and others not, is good, for as to thoſe which are not it is ſurpluſage.

TRESPASS for breaking and entering his cloſe, and treading down his graſs, &c. *necnon in eodem clauſo venatui ſuæ* ANGLICE "did hunt," *eodem defendente exiſtente artifice inferiori* ANGLICE "an inferior tradeſman," viz. *pannario, contra pacem, et contra formam ſtat.* Verdict on not guilty for the plaintiff.

AND IT WAS MOVED *in arreſt of judgment*, that the concluſion of "*contra formam ſtat.*" goes to the whole count, and part of the treſpaſs contained is not forbidden by any ſtatute; wherefore the whole count is void.

* [122]

S.C. Com. Rep. 26.
S. C. 1. Ld. Ray. 249.
S. C. Salk. 212.
S.C. Comb. 420.
S.C. Carth. 382.
S. C. 5. Mod. 307.
S. C. Holt, 661.

*It was anſwered, that there were three ſeveral treſpaſſes laid in the count, which are diſtinct from each other, and ſo many ſeveral counts; ſo that "*contra formam ſtat.*" goes only to the latter, to which it is annexed.

HOLT, *Chief Juſtice*, ſaid, If an act of parliament increaſe a penalty, or deprive a man of any benefit which he had before at common law, then if you count on the ſtatute, and do not bring yourſelf within it, and conclude *contra formam ſtat.* it is naught. And if there be no act of parliament at all, and you conclude *contra formam ſtat.* it is only ſurpluſage: ſo is the caſe of *Ward* v. *Richill* (*a*).

But now the queſtion is here, What ſhall be done on an act that gives an increaſe of coſts, wherein it only reſtores the common law, which was taken away by 22. & 23. *Car.* 2. In this count are ſeveral treſpaſſes alledged, the latter whereof is only within the ſtatute, and the concluſion of the count is, "*contra formam, &c.*" which though in grammatical conſtruction it goes to the whole count, yet in law it goes only to the hunting not being duly qualified; and why may we not apply it only to the latter part, and reject it as to the reſt as ſurpluſage, as was done on an indictment in the caſe of *Page* v. *Harwood* (*b*).

Judgment for the plaintiff. And that ſeeing the hunting and breaking the cloſe cannot be ſeparated, the plaintiff ſhall have coſts according to the new ſtatute.

(*a*) 1. Vent. 103. (*b*) Allen, 43, 44.

Caſe 233.

Parker *againſt* Meller.

In replevin, property in a ſtranger a good plea in bar.

REPLEVIN. The defendant pleaded in bar, "property, at the time of the taking, in a ſtranger, and not in the plaintiff himſelf;" and ſo prayed a return. The plaintiff demurred.

S. C. Carth. 398. S. C. 3. Salk. 54. S. C. 1. Ld. Ray. 217. 1. Vent. 127. 249. 2. Lev. 58. 3. Keb. 219. 232. Cro. Jac. 519. Cro. Eliz. 596. Vide Mich. 2. *Anne*, Preſgrave v. Saunders, in the k.ng's bench, &c.

Par

URIAM. Property, without doubt, may be pleaded in action in replevin; and if it be in the defendant, he may turn; but if it be in a ſtranger, unleſs he has the cuſtody nt, and ſo makes a ſpecial avowry, is a queſtion, whe- n have a return.

PARKER *againſt* MELLER.

rwards this Term IT WAS ADJUDGED, that the plea was igh he had made no avowry at all, becauſe he had the firſt ; and it was not reaſonable the plaintiff ſhould retain, property; and ſo adjudged, that he ſhould not have a

reſgrave v. Saunders, 1. Salk. 5. S. C. 6. Mod. 81. S. C. Holt, 2. Ld. Ray. 914.

he King *againſt* Page, Ingram, and Others.

Caſe 234.

'MENT FOR A RIOT a calendar month and a day after it committed, before juſtices of peace *per ſacramentum &c. pro Domino rege præſentatum exiſtit.*

Riot, where inquiſition is on view, the ſheriff muſt be preſent, and the juſtices may make inquiſition after a month.

diſtment was on the ſtatute of 13. *Hen.* 4. c. 7.

T WAS RESOLVED,

That where the inquiſition is on view, there the ſhe- e preſent, but not where the inquiſition or indictment is act committed.

S.C. 2. Salk. 593. S.C. Carth. 383. S.C Comb. 423. S. C. 1. Ld. Ray. 215.

DLY, The ſtatute is only mandatory to the juſtices, un- lty, to make inquiſition within a month, but does not ne doing it after the month, which they may, if they will, o.

See 2. Hawk. P. C. 7th edit. ch. 65. page 60 to 71. where all the law upon this ſubject is collected.

DLY, This being a ſpecial inquiſition, it is always *pro e*; but if it be at the aſſizes, or before juſtices of *oyer ner*, then it is *pro corpore comitatûs.*

Head *againſt* Tyler.

Caſe 235.

, *Chief Juſtice.* If there be a copyhold eſtate for life, inder to *B.* and the tenant for life forfeit, it is not ſuch a tion as to let in the remainder; but THE LORD ſhall aring the life of tenant for life.

Forfeiture of tenant for life of a copyhold.

1. Roll. Abr. 509. 3. Com. Dig. "Copyhold" (M. 6.). and Doe Others v. Hellier, 3. Term Rep. 163. 173.

S. C. Holt, 161. 1. Saund. 151. on the demiſe of

Cholmely *againſt* Bloom.

Caſe 236.

AGAINST THE DEFENDANT *in cuſtodiâ mareſchalli*, on id made at *Cheſter*. The defendant pleaded, he was, at the hibiting the bill, an inhabitant, and notoriouſly conver- county-palatine of *Cheſter*, VIZ. at *Nantwich.*

Foreign plea muſt be ſworn to, but a plea to the juriſdiction need not.

plea the plaintiff apprehending to be a foreign plea, he judgment, becauſe it was not ſworn to (*a*).

S.C. 3. Salk. 173. S.C. 5. Mod. 335. S.C. Carth. 402. 3. Will. 51.

(*a*) See 4. & 5. *Anne*, c. 16. ſ. 11.

CHOLMELY *againſt* BLOOM.

CHESSHYRE moved to ſet the judgment aſide, becauſe it was not a foreign plea; for pleas to the juriſdiction of the court are not ſuch, as pleas of *antient demeſne*, privilege, &c. and therefore are never ſworn to. But a foreign plea is, where the defendant carries the action out of the county where the plaintiff had laid it. If the action be tranſitory, there, if the defendant carry it into another county, the plea is naught, except in ſpecial caſes; but if the action be local, by removing it into another county than where * [124] the plaintiff had laid it, it is properly a foreign * plea; which is not done in this caſe; for here the action is laid in *Cheſhire*, and the defendant does not in his plea remove it from thence.

Quod Cur. conceſſit; and the judgment was ſet aſide.

Caſe 237.

Sheppherd *againſt* Taylor.

Diſtringas is the execution on a judgment in a court baron, and not a *levari*, without particular cuſtom.

ERROR in replevin for taking ſix pewter diſhes. The defendant makes conuſance, that a judgment was had in a court-baron againſt the plaintiff, and that a *levari facias* iſſued out againſt him; upon which he took the pewter diſhes. The plaintiff demurred, and had judgment.

S. C. 3. Salk. 219. 272. 3. Lev. 404. 3. Salk. 107. 5. Com. Dig. "Pleader" (3. M. 24.). 1. Wilſ. 316.

And it was now affirmed, becauſe a *diſtringas* is the execution on a judgment in a court-baron, and not a *levari facias*, without a particular cuſtom alledged, which is not done; and the avowant ſhould not have begun with the judgment firſt, but have ſhewn a plaint entered, and *ſuperinde taliter proceſſum fuit*; and ſo judgment againſt him.

Caſe 238.

Earl *againſt* Plummer.

The commencement of the ſtatute 29. Eliz. c. 4. concerning ſheriff's poundage.

DEBT BY A SHERIFF, for his fees for executing an *extent facias* returnable *quinque Paſch.* wherein he declared on a ſtatute made the twenty-ninth of *October*, in the twenty-eighth year of *Queen Elizabeth*. The defendant demurred to the declaration:

S. C. 1. Salk. 332.

FIRST, Becauſe there is no ſuch return as *quinque Paſch.*

Sed non allocatur, becauſe at moſt it is but an erroneous writ; and if the party himſelf will take out ſuch an erroneous writ, he ſhall not, under pretence thereof, cheat the ſheriff of his fees.

SECONDLY, Becauſe the ſeſſion of parliament did not commence on the twenty-ninth of *October*, but on the fifteenth of *February* following.

SED TOTA CURIA *contra*; for as it was now made appear from a copy taken from the parliament rolls, and from 1. *Anderſon*, 294, 295, the *teſte* of the writs of ſummons of that parliament were the fifteenth of *September*, in the twenty-eighth year of *Queen Elizabeth*, appointing them to meet the fifteenth of *October* following; and on the eighth of *October* the parliament was prorogued to the twenty-ſeventh of *October*, and after to the twenty-

renty-ninth of *October*; and then the parliament was adjourned, it not prorogued until the *February* following.

EARL *againſt* PLUMMER.

Judgment was given for the plaintiff.

* [125]

* Fiſher *againſt* Pomfret. Caſe 239.

PER CURIAM. A bill of exchange payable to a man and his order, or to his order only, is one and the ſame. S.C.Carth. 403.

Ord *againſt* Howard. Caſe 240.

F you plead *alien-née* in *bar*, you muſt lay a place where he is born; but if in *abatement*, it is triable where the action is ought. "*Alien-née*" pleaded in bar or abatement.

1. Saund. 8. Poſtea, Trin. 10. *Will.* 3. Williams *v.* Drury.

Sir Roger Puleſton *againſt* Sir Peter Warburton. Caſe 241.

JECTMENT on a demiſe made the tenth of *April* 1697, habendum from the twenty-fifth of *March* then laſt paſt for e years, by virtue whereof he entered and was poſſeſſed, until the fendant, *April* the ſeventh, entered and ejected him; which claration was of *Trinity Term* laſt. Iſſue not guilty. Verdict r the plaintiff, on a trial in *Michaelmas Term* laſt. Ejectment brought on a demiſe bearing date ſubſequent to the ejectment not amendable. S. C. 5. Mod. 332. S. C. Salk. 48. S.C. Carth. 401. 1. Sid 316. 416. Ray. 165. 1. Mod. 250. Comb. 394. 1. Com. Dig. "Amendment" (L 2.). 1. Wilſ. 1. 3. Burr. 1290. 2. Bac Abr. 163. 1. Term Rep. 782.

AND IT WAS MOVED *in arreſt of judgment*, that it appears in the claration, that the plaintiff had no cauſe of action at the time of action brought.

And it was now moved, that, being a plain miſtake of the clerk, was amendable; but eſpecially in ejectment, which is a creature the Court, ſet up to try a title; wherein, according to every 's experience, the defendant is changed, and ſometimes the intiff, and ſometimes the term of the demiſe is enlarged.

THE COURT gave judgment that they would have it amended if y could, but they were judges of law and not of equity; and if h amendments ſhould be ſuffered, great uncertainties would be roduced; that if this were amended, the nature of declarations uld be altered, and another Term would be counted on.

And judgment was now ſtayed.

After which THE COUNSEL *of the plaintiff* moved, that although ey could not have judgment for the recovery of their term, yet y might for their coſts and damages, here being an entry and ver found, which is ſufficient to entitle them to that; as if the m expires pending the ſuit, the plaintiff ſhall recover his coſts damages, though not his term.

ED PER CURIAM *contra*; that in caſe of the expiration of a * pending the writ, the Court ſhall go on to judgment as to * [126]

SIR ROGER PULESTON *againſt* SIR PETER WARBURTON.

the coſts and damages, becauſe it was not the plaintiff's fault that the term expired pending the writ, and his writ is not falſified thereby; but that it is otherwiſe in this caſe, becauſe here is no term at all; and the reaſon of damages in ejectment is the turning the termor out of poſſeſſion; and here it appears that he had no poſſeſſion at all.

Afterwards it was agreed, by conſent, that they ſhould amend (*a*); that the judgment be for a ſecurity; that the defendant ſhould take a new declaration; and that the defendant ſhould deliver poſſeſſion, if the verdict were againſt him, and not bring a writ of error.

(*a*) See Anonymous, 1. Salk. 257. Scrape *v.* Rhedes, Barnes, 8 Driver *v.* Stratton, Barnes, 17 Oates *v.* Shepherd, 2. Stra 1272. Lee *v.* Ellis, 2. Black. Rep. 940 Anonymous, 6. Mod. 130. Doe *v.* Pilkington, 4 Burr. 2447. Vicars *v.* Heyton, Cowp. 841. Church *v.* Perkins, 3. Term Rep. 749. and Mr Serjeant Runnington's Hiſtory, Principles, and Practice of the Legal Remedy by Ejectment, page 226 to 233.

TRINITY

TRINITY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

.ydſton *againſt* The Mayor and Bailiffs of Exeter. Caſe 242.

HEY returned a *mandamus*, and there was neither the hand of the mayor, nor the ſeal o ſthe corporation to it:

Return to a *mandamus* need not be under the hand of the mayor or ſeal of the corporation.

.nd PER CURIAM, It is well enough without it. Before the ite of *York* the ſheriff need not have ſet his hand to any return. ie return be falſe, you may bring your action againſt the whole / politick for making a falſe return; and againſt a particular on for procuring a falſe return.

Poſtea Mich. 11. *W.* 3. The King *v.* Borough of Abing- "Mandamus"

—See alſo 1. Sid. 257. 1. Salk. 192. Skin. 368. Fitzg. 4. 5. Com. Dig.

.)

* Hodgeſon *againſt* Segrave. Caſe 243.

RIT OF ERROR on a judgment in the county palatine of *Cheſter*: the plaintiff in error delayed to bring in the re- ; whereupon the defendant moved for a rule to bring it in, for the plaintiff to aſſign his errors, or otherwiſe that they ht return a *nonproſs*.

Chancery will grant a writ of execution, on producing a certificate from the king's bench office, that the plaintiff in error out of the county palatine of *Cheſter* does not bring in the record.

HE COURT ſaid, that their direct way was to take a certi- te from the king's bench office, that the record is not come in, on ſhewing thereof in chancery, they will have a writ *de exine judicii* of courſe.

Caſe 244. West *againſt* Cole.

Where on writ of enquiry intire damages are given, and for part of which no damages could be given, that part ſhall be rejected as ſurpluſage. S. C. poſt. 157.

INDEBITATUS ASSUMPSIT, and *quantum meruit* for meat, drink, and lodging; and another *aſſumpſit* and *quantum meruit*, in the ſame declaration, for wares ſold. Judgment by default. Writ of enquiry, and intire damages given *occaſione præmiſſorum*.

IT WAS MOVED, *that judgment ſhould be ſtayed*; becauſe in the ſecond *aſſumpſit* and *quantum meruit* there is no averment in fact of the value of the wares, and ſo is void, and for which no damages can be given. A *quantum meruit* for wares ſold, without averment *de facto* of the value, is naught; but here being another *aſſumpſit* well laid, we will ſuppoſe all the damages given for that, and reject the other as ſurpluſage.

Caſe 245. Crawley *againſt* Blewett and Wolf, Sheriff of Middleſex.

Nonſuit not to be ſet aſide without conſent.

ACTION UPON THE CASE for a falſe return of *nulla bona* upon a *fieri facias*, when there were goods ſufficient. The plaintiff declared on a judgment in the common pleas, and on evidence produced a copy of a record, in *Michaelmas Term*, in the eighth year of *William the Third*, wherein was written in the margin "*Cook*," (who is one of the prothonotaries of the common pleas) but there was no "*placit. coram, &c.*" at the top.

For which omiſſion the defendant inſiſted, that there was no ſuch copy of a record; that it did not appear who this *Cook* was. That the plaintiff declared of a plea held before *Sir George Treby*, and it did not appear that the record produced by him was ſuch a one.

And of that opinion was HOLT, *Chief Juſtice*, who tried the cauſe; * which the plaintiff perceiving was nonſuited.

* [128]

And now the plaintiff moved, that although in ſtrictneſs he ſhould begin again, yet that being a hard caſe, the nonſuit might be ſet aſide, and they try it *de novo*.

HOLT, *Chief Juſtice*. Formerly, and eſpecially in TWISDEN's time, if you had declared that ſuch a one was impleaded in the king's bench *per billam*, and had produced THE PLEA-ROLL, wherein it is entered, that *memorand.* ſuch a one came *et obtulit billam*, this was not adjudged ſufficient, unleſs you had alſo produced a copy of the bill on the file, for want of which there were frequent nonſuits; though I could never be of that mind; and have on debate ruled a copy of the plea-roll to be a ſufficient proof of the bill.

But in this caſe the defendant would not conſent.

Wherefore THE COURT ſaid, they could not do it: when he had, by his voluntary act, put himſelf out of court, they could not, by their own authority, bring him in again.

The

The King *againſt* Melling. Caſe 246.

TRIAL was never granted, after a trial at bar, purely going againſt evidence, except once in *King James's* they are often granted for ſpecial reaſon, as miſbehaviour r ſome other miſdemeanor.

New trial not grantable after trial at bar. S. P. ante, 93. 5. Mod. 348.—

462. 466. 2. Ld. Ray. 1358. 2. Stra. 1105. 1. Burr. 395. Tidd's Practice, 560.

Graſcot *againſt* Warren. Caſe 247.

MENT AND SPECIAL VERDICT. The caſe was this: n poſſeſſed of a term deviſed it to an infant *in ventre ſa* ſhould be a ſon; and if it ſhould be a ſon, and die during ty, then he deviſed it to his grandſon; after which he ing, his wife executrix, and the child was afterwards proved a daughter.

S. C. 2. Eq. Abr. 361. c. 5.

T WAS ADJUDGED, without argument, that the ex- nd not the grandſon, ſhould have the term; becauſe the was not to have it but upon a precedent contingency, irth of a ſon, and his death in his infancy, which condi- be firſt performed; and it appears plainly, that the in- e teſtator was that he ſhould not have it otherwiſe.

* Bacon *againſt* Debarry. Caſe 248.

ON A BOND conditioned, that the defendant, on behalf *De Ruiter*, ſhould ſtand to the award of *C.* and *M.* of all etween the defendant, as attorney to *De Ruiter*, on the and the plaintiff on the other, concerning certain ac- etween the plaintiff and *De Ruiter*. The defendant award made. The plaintiff replies, and ſets forth an hich he ſets forth to be made *de præmiſſis*; which was, lefendant, on behalf of *De Ruiter*, ſhould pay to the orty-five pounds ſix ſhillings and ten pence, and that after- plaintiff and defendant, on the behalf of *De Ruiter*, ſhould nutual releaſes to each other, *ad uſum eorum alterius*, of s, matters, &c. concerning thoſe accounts; and aſſigns a non-payment of the money. The defendant demurs.

Submiſſion to award by attorney ſhall bind the attorney. S. C. 1. Salk. 70. S. C. Skin. 679. S. C. Comb. 439. S. C. Carth. 412. S. C. Holt, 78. S. C. 1. Ld. Ray. 246. S. C. Ray. Ent. 361. 3. Leon. 62. 1. Brown. 62. 2. Lev. 6. 2. Saund. 337. Kyd on Awards, 147 to 154.

T WAS RESOLVED,

, That the ſubmiſſion of the debt is good; for the de- uts himſelf in the place of *De Ruiter*, and is bound to he award.

DLY, That this award is a void award, becauſe it is not ut of one part only: for firſt, the mutual releaſes are to between the plaintiff and defendant, where they ought to 1 between the plaintiff and *De Ruiter*, or to be delivered ry, for the uſe of *De Ruiter*; for a releaſe to *Debarry*

BACON *againſt* DEBARRY.

can by no means advantage *De Ruiter:* we would, if we could, have conſtrued it to be a releaſe to *Debarry* for *De Ruiter*, but the words "*ad uſum alterius eorum*" exclude this conſtruction.

The laſt time this caſe was argued, SIR BARTH. SHOWER inſiſted, that this award was good if there had been no releaſes at all awarded, as to which there has been ſome doubt if ſuch award be made *de præmiſſis*; which this is not. It is pleaded, indeed, and averred to be *de præmiſſis*, but when the award is ſet out, that ſays no ſuch thing. But ſuppoſing it to have been made *de præmiſſis*, yet when he comes and does not reſt on that, there is a void thing awarded on the behalf of *De Ruiter*. It is plain that the arbitrators did not rely on the payment of the money to be ſatisfaction, but on the releaſes too, which ſpoils the whole award; and this is grounded on the caſe of *Capel v. Holland (a)*, and on the caſe of *Hall v. Maſſy (b)*. If in this caſe it had been ſaid, that the money ſhould have been paid in ſatisfaction of all accounts, or * that they had examined all accounts, and on ſtating thereof there had appeared ſo much due to *Bacon*, and that they had awarded the money to have been paid for all accounts, the ſubſequent matter would not have vitiated it, as in the caſe of *Burbidge v. Raymond (c)*.

2. Lev. 3.

* [130]

Therefore judgment for the defendant.

(a) Stiles, 44. Allen, 10. 1. Roll. Abr. 254.
(b) 1. Roll. Abr. 254.
(c) 1. Roll. Abr. 255.

Caſe 249.

Freeman *againſt* Bernard.

An award of mutual releaſes, and nothing elſe, is not good. Poſtea Mich. 12. *Will.* 3. Anonymous *acc.* Vide 2. Jo. 6. 15.

ASSUMPSIT on the ſale of hops. The defendant pleaded ſubmiſſion to arbitrators, who awarded, that each party ſhould releaſe all actions to the other; that he tendered ſuch a releaſe, and was and ſtill is ready to releaſe, and ſo prays judgment *ſi actio*. The plaintiff demurred.

The queſtion was, Whether the defendant's plea was a good bar?

S. C. Comb. 440. S. C. Holt, 79. S. C. Carth. 378. S. C. Salk. 69. S. C. 3. Salk. 45. S. C. 1. Ld. Ray. 447. S. C. Ray. Ent. 368. 1. Mod. 274. 3. Lev. 264. 413. See Kyd on Awards, 137. 243.

HOLT, *Chief Juſtice*, delivered the opinion of the Court; and ſaid, There is no queſtion, but if they had awarded a ſum of money to be paid, or a horſe, or anything in ſatisfaction, the very awarding of this, though not actually delivered, would have been a good bar. But now in this caſe there is nothing awarded, but only a way and means mutually to diſcharge all actions. Now there is a great difference between awarding the doing anything in ſatisfaction, and the awarding a releaſe of an action; for when a thing is awarded to be done in ſatisfaction, that raiſes a new duty in lieu of the old one diſcharged; as if money be awarded to be paid, debt lies for it; but in the caſe of a releaſe, there is only a method ordered to diſcharge the action. If the award itſelf diſcharge the action, there needs no releaſe to be given, becauſe action was gone before;

before; but the action being not discharged until the release comes, until it comes actually it cannot be a bar. FREEMAN *against* BERNARD.

Judgment for the plaintiff.

Bennoyer *against* Brace. Case 250.

HOLT, *Chief Justice.* This case stands for the resolution of the Court, on a motion: Trespass against four; verdict and judgment for the plaintiff against four; all four bring a writ of error after judgment given; one of them dies before the record certified, and the plaintiff takes out a *capias ad satisfaciendum* against the survivors; whereon two questions have been:

Death of one of the plaintiffs in error must be suggested on the roll, before execution can be taken out.

FIRST, Whether, if judgment be had against two * defendants, and one dies, execution may be had against the survivor without a *scire facias?* Which we hold it may, supposing it to be within the year; because there is no change of the record at all, and it shall not be intended there was a release to the party deceased.

* [131]

S. C. 1. Ld. Ray. 244. S. C. 5. Mod. 338. S. C. Salk. 319. S. C. Holt, 640. S. C. 8. Mod. 108. S. C. Comb. 441. S. C. Carth. 404. Moor, 367. Noy, 151. Carter, 112. 1. Salk 264. 319. 5. Com. Dig. "Pleader" (3. L. 2.) 4. Bac. Abr. 416. 419.

SECONDLY, Whether in this case, when the writ of error abated by the death of one of the plaintiffs in error, execution might be taken out against the rest, without apprising the Court thereof? By the writ of error the hands of the Court were tied up, so that they ought not to award execution until they are satisfied their hands are loose. Now here is an execution, without making this matter appear to the Court, for which reason it went out erroneously;

And therefore let a *superfedeas* go *quia emanavit improvidè, &c.*

Prince *against* Molton. Case 251.

ACTION ON THE CASE, wherein the plaintiff declared, that on the second of *July*, in the sixth year of *William the Third*, he was possessed of a meadow next adjoining to a river, and to another close contiguous to the said river; which river, time out of mind, ran through his meadow to an antient mill of the defendant's without any overflowing; that the defendant, on the third of *August*, in the sixth year of *William the Third*, extended and enlarged the foundation of his mill further into the river, whereby he so obstructed the river, and exalted the water, that it overflowed and drowned the plaintiff's meadow, *per quod* he lost the use and profit thereof, from the aforesaid second day of *July* to the time of exhibiting the bill. "Not guilty" pleaded, and verdict for the plaintiff.

Where damages are given for what is impossible, it is ill. S. C. Carth. 386. S. C. Comb. 442. S. C. 2. Salk. 663. S. C. 1. Ld. Ray. 248. S. C. Holt, 192. Ante, 127. 2. Mod 154. Dougl. 696.

IT WAS MOVED *in arrest of judgment*, that intire damages are given to the plaintiff, and from the second of *July* to the third of *August* he had no damages at all, by his own shewing; and it shall not be intended that the damages given by the jury are only for the time after the third of *August*; for the damages shall be understood to be given not according to law, but according to the allegation

PRINCE *againſt* MOLTON.

allegation of the plaintiff, who lays his damage; as reſolved in the caſe of *Harbin v. Green (a)*.

And firſt, ALL THE COURT, except ROKEBY, *Juſtice*, ſeemed to think it well enough; for it may be the plaintiff laid up his meadow for graſs from the ſecond of *July*. But afterwards judgment was arreſted; for though he might loſe the profit from that time, he notwithſtanding could not loſe the uſe. If he had not
* [132] ſaid "*uſum*," * they might have given judgment for him. This caſe is the very ſame with the caſe of *Harbin v. Green*.

The judgment was arreſted.

(*a*) Hob. 189. Moor, 837.

Caſe 252. The King *againſt* Jeriſon and the Inhabitants of Cheſterfield.

Boy put out to learn to ſhave, there being no covenants with him, gains no ſettlement.

A BOY was put out to a barber for a year to learn to ſhave, and to make bob-periwigs, according to covenants between the barber and *Sir Paul Jenkinſon*, the boy's maſter; to which covenant the boy was no party.

AND IT WAS ADJUDGED this made no ſettlement, becauſe it is no ſervice; he being no more than a boarder there for his education, which ſhall not make a ſettlement.

S. C. Salk. 479. S. C. Skin. 671. S. C. 5. Mod. 328. S. C. Carth. 400. S. C. Comb. 445. Cald. 31.—See all the caſes on this ſubject collected in the 2d vol. of Conſt's Poor Laws, page .

Caſe 253. Chickham *againſt* Dickſon.

Prohibition may be after ſentence, if it appear on the proceedings that they have not juriſdiction.

PER CURIAM. If one be ſued in the ſpiritual court, for an eccleſiaſtical matter, out of his dioceſe, it is too late to come after ſentence for a prohibition; becauſe the party has affirmed the juriſdiction. So if he be ſued for a matter not belonging to eccleſiaſtical conuſance; but if it appear on the proceeding, that they have meddled with a matter which belongs not to them, a prohibition ſhall go after ſentence; but *ſecus*, where that does not appear on the face of their proceedings (*a*).

S. C. Comb. 448. 1. Roll. Abr. 80.

(*a*) See Terremoulin v. Sandys, poſt. Pool v. Gardner, Carth. 463. Poſt. 143. Comb. 462. Carth. 423. and 206.

Caſe 254. Anonymous.

Rule.

HOLT, *Chief Juſtice*, made this rule be obſerved for the future. That if a man ſurrender himſelf on a judgment given againſt him, and he be not charged within two Terms after the judgment, he ſhall be diſcharged on common bail; but at the ſame time he muſt bring a certificate from the clerk of the errors, that there

of error pending; becauſe otherwiſe he might, by writ of loſe up the hands of the plaintiff, and ſo take advantage of wrong. ANONYMOUS.

Anonymous. Caſe 255.

.T, *Chief Juſtice.* When you plead outlawry in abate- ent, when you put your plea in the office, you muſt ſhew r, or ſome ſuch matter as may make the outlawry appear; conclude only *prout patet per recordum*, as you do when ad it in bar, and have time to bring in the record.

Outlawry, how pleaded in bar and in abatement.

TRINITY TERM,

The Ninth of William the Third,

IN

The Exchequer Chamber.

Sir Edward Ward, *Knt. Chief Baron.*
John Blencowe, *Eſq.*
Henry Hatſell, *Eſq.* } *Barons.*
Robert Tracy, *Eſq.*
Sir Thomas Trevor, *Knt. Attorney General*
John Hawles, *Eſq. Solicitor General.*

Caſe 256.

* Leaves *againſt* Bernard.

Where a ſuit is commenced by bill, praying judgment of the count is a plea in bar.

S. C. 5. Mod. 231. 4. Bac. Abr. 230. 1. Com. Dig. 90.

CASE on ſeveral promiſes: The defendant *venit et defen vim et injuriam quando, &c. et petit judicium de narrati et quòd narr. præd. caſſet.* The plaintiff joined in murrer, and had final judgment.

The defendant brought a writ of error, alledging that final ju ment ought not to have been, but only a *reſpondeas ouſter* awa ed, this plea being only in abatement, and not in bar.

SED PER CURIAM TOTAM, By the courſe of the court king's bench, whereſoever you commence *by bill*, a praying ju ment of the count is a plea in bar; and in that caſe, if you pl in abatement of the count, you muſt not pray judgment of count, and that the count may be quaſhed; but you muſt p judgment of the bill, and that the bill may be quaſhed.

The judgment was affirmed.

Caſe 257.

Roe *againſt* Haugh.

S. C. 1. Salk. 29. S. C. 3. Salk. 14.

B. WAS indebted to *A.* in the ſum of forty-two pounds, and in conſideration *quòd* A. *accipere vellet ipſum* C. *fore deb rem ipſius* A. *pro quadraginta duob. lib. eidem* A. *per* B. *tunc de*

loco ejuſdem B. *ſuper ſe aſſumpſit, et eidem* A. *promiſit quòd eaſdem quadraginta duas lib. eidem* A. *ſolvere vellet. A.* executors, on this promiſe, bring an *aſſumpſit* againſt *C.* in their count, that *A.* the teſtator truſting to the ſaid of *C. accepit præd.* C. *fore debitorem ipſius A.* without ything that * he diſcharged *B. Non aſſumpſit* pleaded; nd judgment for the plaintiff. Writ of error brought in quer chamber.

Roe against Haugh.

* [134]

rror inſiſted on was, that this is a void *aſſumpſit*, here good conſideration; for except *B.* was diſcharged, *C.* be chargeable;

hich reaſon Blencowe, Powell, and Ward were of judgment ſhould be reverſed; but Powis, Nevill, re, and Treby, that this being after verdict, they ſhould hey could to help it; to which end they would not con- ly as a promiſe on the part of *C.* for as ſuch it would not except *B.* was diſcharged; but they would conſtrue it utual promiſe, *viz.* that *C.* promiſed to *A.* to pay the debt d *A.* on the other ſide promiſed to diſcharge *B.* ſo that be not actually diſcharged, yet if *A.* ſues him, he ſub- elf to an action for the breach of his promiſe,

Vide 1. Saund. 210, 211. Sur Demur.

dgment was affirmed.

TRINITY

TRINITY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.* } *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 258.

By admiralty law, property of a ſhip taken from an enemy without letters of mart, veſts in the King.

S. C. Carth. 398. S. C. 5. Mod. 340. S. C. 1. Salk. 32. S.C. Comb. 444. 2. Salk. 440. 3. Lev. 351. 6. Mod 13. 4. Mod. 176. 2. Lev 27. Ray. 489. 1. Show. 20. 2. Saund. 260. Dougl. 594. 613. *notis.* 3. Ter. Rep. 223. 6 Ter. R. p. 385.

The King *againſt* Broom.

BROOM, by authority under THE AFRICAN COMPA who, by the king's letters patent, had orders to take ſhips of enemies, and diſpoſe them as they pleaſed, to *French* ſhip on the high ſea, and carried it into a river beyond and ſold it there. This ſhip, upon a general monition *omnes gentes* fixed upon the *Exchange*, was condemned in ADMIRALTY for prize; and the grantee of the perquiſites o admiralty libelled, in the name of the king's advocate, ag *Broom*, reciting the taking and the condemnation; and that it a perquiſite of THE ADMIRALTY; and alledged, that *Broom* not delivered the ſhip on requeſt, but had converted it, And ſentence was given againſt *Broom* in THE ADMIRA from which he appealed to the Delegates;

And now prayed *a prohibition*, ſuggeſting, that the matter *infra corpus com.* and this is a plain action of trover.

But againſt the prohibition it was objected, that it is after tence, and to ſtop his own appeal; and for this cited 1. *Cr Latch*, 253. *Winch*, 8. 2. *Bro.* 34. 12. *Co.* 77. 2. *Aur.* 319.

THE KING *against* BROOM.

But PER CURIAM, If a prohibition be not grantable after ſen-ce, they ſitting all the Vacation may haſten the ſentence, and clude the parties before the Term; and it is proper for the ty to appeal to ſuſpend the ſentence until he may be relieved by hibition; and where in the libel or proceedings it appears that cauſe of ſuit aroſe on the land, they may be * prohibited at any ne.

Poſtea Mich. 9. *Will.* 3. Ter-remoulin *v.* Sandys.

* [135]

SECONDLY, It was objected againſt the prohibition, that this er did not appear to be part of the continent, or of the main ; and the ſuggeſtion, that this is *infra corpus com.* is not proper, auſe beyond ſea there are no ſuch diviſions by counties.

Ante, p. 132.

Poſtea Mich. 10. *Will.* 3. Pool *v.* Gardner.

But this was not regarded by THE COURT; that where the ginal cauſe ariſes on the high ſea, THE ADMIRALTY ſhall hold of the entire ſuit, though other matter ſubſequent ariſe on the l. 3. *Cro.* 685. 2. *Saund.* 259. 1. *Sid.* 320.

And it was reſolved by THE WHOLE COURT, that though, if ds be taken from an enemy, it veſts the property in the party ng them, by our law; yet by the admiralty law, the property of ip taken without letters of mart, veſts in the king upon the ng, and this on the high ſea; therefore that which was taken but in truſt for the king, and he who took it is but account-to him; and for the account, and breach of this truſt, the ſuit the admiralty very proper. Now if the party who took this , brought it to land, and there ſold it, and converted it to his uſe, this makes him a wrong-doer *ab initio (a)*. And the verſion on the land is but one continued act, with the capture, is evidence to explain his intent in the capture, to ſhew his ch of truſt on the ſea; and as caſes very ſtrong in this caſe e cited, 1. *Sid.* 320. 367. 2. *Saund.* 259. *Palm.* 96. *Roll. Rep.* 157.

and the rule for prohibition was diſcharged (*b*).

(*a*) The Six Carpenters' Caſe, 8. Co.

(*b*) As to the excluſive juriſdiction of court of admiralty upon the queſtion of prize, ſee Le Caux *v.* Eden, Dougl. 594. Lord Camden *v.* Home, 4. Term Rep. 382.—See alſo Strange, 1078. 2. Term Rep. 649.

MICHAELMAS TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 259. * The King *againſt* Sir Richard Raines, Judge of the Prerogative Court.

If a *mandamus* be iſſued to the prerogative court to grant adminiſtration, and it appears that there is a will in litigation, the Court will, on affidavit of the fact, ſuperſede the writ.
S. C. poſt. 295.
S. C. Salk. 299.
S. C. Carth 457.
S. C. 3. Salk. 162. 233.
S. C. Holt, 310.
S. C 1. Ld. Ray. 362.
S. C. 3. Peer. Wms. 337.
Fitz. 125.
Strange, 857.
3. Atk. 566.
2. Atk. 126.
1. El. Rep. 456.

ONE *John Gray* died in *April* laſt, making two executors, who, on the twentieth of *April* laſt, brought the will into court to be proved; where, the will being litigated, proceſs iſſued to all parties concerned, and among others to *Francis Gray*, brother to the deceaſed, who refuſed to appear, and ſo was adjudged in contempt; but the others appeared, and the cauſe was ſet down for ſentence on the twenty-fifth of *October*, which is *Monday* next. But the laſt day of laſt Term, on a motion of counſel by the procurement of *Francis Gray*, a *mandamus*, on ſuggeſtion that *J. Gray* died inteſtate, was granted to the Judge of the prerogative court, commanding him to grant adminiſtration; which writ was returnable this day, the twenty-third of *October*.

And now NORTHEY prayed the writ might be ſuperſeded; becauſe it was a ſurprize to the Court, who would not have granted it if they had been appriſed of the matter; for by this means the ſpiritual court would be ouſted of its juriſdiction; for if the Judge return in it was litigated before him, that return perhaps might be inſufficient, and ſo a peremptory *mandamus* granted; or, if he return that there was a will made, they would try in an action the validity of the will.

And

nd THE WHOLE COURT gave judgment, that the writ ſhould uperſeded; and eſpecially as this caſe is, where the party might e litigated it in the ſpiritual court, where he would not appear, is in contempt.

THE KING *againſt* SIR RICHARD RAINES.

* [137]

OLT, *Chief Juſtice*, added, that ſuppoſing they ſhould not erſede * the writ, yet it would not be any advantage to them; ſuppoſing *Sir Richard Raines* ſhould return "that there was a ill made," he might go on and prove the will, and in their action a falſe return, give the probate in evidence; which probate, ong as it ſtands in force, ſhall conclude all others from ſaying contrary; to which end he quoted an *Anonymous Caſe*, adged in KEELING's time: An executor brought an action ducing his teſtamentary letters; the defendant pleaded that he not executor, which, according to *Henſloe's Caſe*, is triable *per*; in the trial whereof, at *Guildhall* before KEELING, the ntiff gave no other evidence than the probate under ſeal, which ELING allowed to be ſufficient; and after, on motion here, all Judges concurred with him; becauſe they having juriſdiction he cauſe, it was an undeniable evidence, which ſhould conde all others from ſaying the contrary (*a*).

A *probate* is concluſive evidence of the exiſtence of a will, until it is revoked.

(*a*) See Rex *v.* Vincent, 1. Stra. 481. *v.* Rhodes, 2. Stra. 703. and the ſes of Kingſton's Caſe, 11. State Trials, 216, &c. where this point is fully diſcuſſed.

Sir Samuel Grimſton *againſt* Moreley. Caſe 260.

OTION to ſtay the entry of a judgment, on a verdict againſt the defendant.

The act of parliament for relief of debtors only extends to protect their perſons, and therefore a creditor may take the goods of ſuch a debtor in execution after his diſcharge.

HE CASE was, The defendant owed the plaintiff rent, and g indebted to ſeveral others, he took advantage of the late act rliament for the relief of debtors; and before the trial, got thirds in number and value to agree to his compoſition; notſtanding a verdict was given againſt him.

nd it was now prayed to ſtay the entry of the judgment, be*e eo inſtante* that the two thirds ſigned, the plaintiff was bound; ſhould the judgment be entered, the defendant would loſe the fit of the act, becauſe judgments are excepted therein.

ID PER CURIAM, The deſign of the act was only to diſge the body, that it ſhould not be liable to be taken, and was ntended to take away any other ſecurity, whereby a man might e by his debt without meddling with his body; now in this there was an action commenced, the defendant was out on bail, f the plaintiff can come at the end of his ſuit without meddling the defendant's body, we cannot hinder him, at leaſt on mo(*a*). But if you think you have the law on your ſide, you may your *audita querela*; or if he take the body in execution, may come before a Judge, who will diſcharge him. But let laintiff, if he will, enter his judgment on the verdict.

(*a*) See S. P. Spalton and Another *v.* Moorhouſe, 6. Term Rep. 366.

Caſe 261.

* Trantor, or Trantrel, *againſt* Duggan.

A ſequeſtration will not lie for not anſwering a bill in equity in the grand ſeſſions, in reſpect of a perſon not reſident within the juriſdiction. S. C. poſt. 172. S.C.Comb. 468.

MOTION for a prohibition to the grand ſeſſions of *R.* becauſe on an *Engliſh bill* in equity there they had gra ſequeſtration; whereas by the law of the land, no man ou be *ſubpœnaed* to anſwer an *Engliſh bill* in thoſe courts, unl live and be perſonally ſerved there, that is within the juriſ thereof.

And THE COURT were of opinion to grant a prohibitio ordered them to ſhew cauſe the firſt day of next Term (*a*).

(*a*) Cauſe was ſhewn in the ſubſequent Hilary Term, and *a prohibition* S. C poſt. 172.

Caſe 262.

Anonymous.

Lands eſcheated are part of the manor.

PER HOLT, *Chief Juſtice*. A tenancy eſcheated to t becomes part of the manor; but if the lord purchaſe i is only holden of the manor, and not part of it; but the r ſervices are part.

Caſe 263.

The King *againſt* Elizabeth Aſhly.

Order of ſeſſions need not appear to be made by juſtices of the diviſion.

S. C. Salk. 479. S.C.3.Salk.258. S. C. Sett. & Rem. 261.

MOTION to quaſh an order of ſeſſions; becauſe it is that the juſtices, by whom the order was made, were *diviſion*.

SED PER CURIAM, That is but directory; for there no juſtices of the diviſion. "Diviſion" is not known in o but of the counties into hundreds; and by that expreſſion ſtatute is meant to go to the next juſtice.

Caſe 264.

Donford, Attorney of the King's Bench, *againſt*]

Treſpaſs will lie for mean profits after recovery in ejectment, tho' writ of error pending.

THE PLAINTIFF recovered in ejectment at *York*; the dant brought a writ of error, and gave bail accordin ſtatute 16. & 17. *Car.* 2. c. 8.; after which the plaintiff, the writ of error, brought treſpaſs for the mean profits.

CHESSHYRE prayed the Court would ſtop this action; judgment be affirmed, or the plaintiff in error nonſuited, have his damages on a writ of enquiry, according to th ſtatute; and if he ſhould recover damages in this action, h be doubly ſatisfied.

But THE COURT refuſed to ſtop the plaintiff, for that it the writ of error was brought for delay; and ſuppoſing * not, and the plaintiff recovered in treſpaſs, that recover

in evidence to a jury, on a writ of enquiry, to leſſen the (a).

DONFORD *againſt* ELLYS.

the Hiſtory, Principles and the Legal Remedy by Ejectment, by Mr. Serjeant Runnington, 163. 439.

Selby *againſt* Ruſſell.

Caſe 265.

ON A BOND for the performance of an award.

AS INSISTED ON *for the defendant*, that the award was auſe there was no final determination of the matter ſubut ſeveral things ſeemed to be ſubmitted to a future deon (a).

ich opinion THE COURT ſeemed to be;

, *Chief Juſtice*, ſaying, that where matters are ſubmitted, at to award all abſolutely, without referring to any future ion; and that he knew but one caſe where arbitrators r to a future act, and that is, where they award the payſuch coſts as an officer of the court ſhall tax, which has wed.

journatur (b).

An award ſhould be abſolute, without reference to a future examination.

S.C. Comb. 456. 6. Mod. 232. Palm. 120.

award was, FIRST, That all w and equity between the uld ceaſe; SECONDLY, That nt ſhould pay to the plaintiff ls; THIRDLY, That if the l upon account prove certain inſt the defendant, that then ay ſo much as the plaintiff ified thereby; FOURTHLY, plaintiff make out, upon oath before a Judge, any diſburſements laid out for the defendant, that the defendant ſhould pay them; but that in caſe the plaintiff do not prove theſe matters within a certain time limited, then they award general releaſes.

(b) See Bond v. Garnet, 2. Stra. 1082. Dighton v. Whiting, Lutw. 51. and Kyd on Awards, 144.

The King *againſt* Griepe.

Caſe 266.

RMATION at common law for wilful and corrupt perwhich ſets forth, that there was a trial in replevin in the common pleas between *Richard* and *Corneford*, wherein the to maintain his title, produced two deeds of leaſe and releaſe, late the fifteenth and ſixteenth of *July* 1681, which were l by *Richard Strode*, who ſaw the execution thereof at le *Houſe*, about the time of the date thereof; and that the t being produced as a witneſs on the part of *Corneford*, dant ſwore, that about the middle of *July* 1681, he was NHAM, "*quandam domum vocat.* NEWNHAM *in parochiâ* IMPTON *Sanctæ Mariæ, in com. Devon.*" INNUENDO, a the ſaid *Mr. Strode*, at any time in the ſaid month of *fuit apud* NEWNHAM *præd.* The defendant was found

Innuendo may explain the meaning of a word or ſentence, but cannot add a new term to the propoſition.

S. C. 5. Mod. 343. S.C. 2. Salk. 513. S C. Carth 421. S. C. Holt, 535. S.C. Comb. 459. S. C. 1. Ld. Ray. 256. S.C. Comy. Rep. 43.

5. Co. 120. Cro. Eliz. 428. Cro. Jac. 430. 2. Inſt. 318. 3. Inſt. 230. 9. St. Tayer, 280. Stra. 1189. 4. Com. Dig. 8vo. 662. Cowp. 672. 1. Term Rep. 66.

THE KING against GRIEPE.

And UPON MOTION *in arreſt of judgment*, the Court gave t opinions *ſeriatim*.

EYRE, *Juſtice*. I ſhall FIRST conſider, whether the words to be ſpoken by the defendant be certain enough, without *innuendo*, to make them material to the point in iſſue; SECONDLY, ſuppoſing them not to be ſo, whether the *innuendo* help it.

* [140]

* FIRST, If a man ſwear falſly in a thing which is immat it is no corrupt perjury (*a*). It is the injury done to the part the falſe oath, that makes the greatneſs of the crime. By all caſes (*b*) it appears, that to make perjury, the falſe oath mu material to the point in iſſue. If *Strode*'s being at *Newnham* not hinder his being at *Albemarle Houſe*, then there is no con diction in his evidence; and for aught appears, *Newnham* m be near *Albemarle Houſe*; and if ſo, then it is not material. King's Counſel inſiſted, that though on indictments on the ſta it be neceſſary the falſe oath ſhould be material to the poin iſſue, yet is it not ſo on indictments at common law; for th though the oath be immaterial, yet if it be falſe it is perjury. I do not underſtand this diſtinction, for the ſtatute does not the nature of perjury, but only inflicts a greater penalty, diſab a man, on a conviction thereupon, to be a witneſs; wherea common law the king may pardon the guilt, and by conſequ may wipe away the diſability. The *Caſe of Howell Gwin* and *Parris*'s *Caſe (d)*, were indictments at common law.

SECONDLY, The *innuendo* will not ſupply it; for it is very reaſonable that when a man's own words will not imply perjur themſelves, that another man's conſtruction ſhould make t amount to it. The caſe of the manor of *Staverton* is very ſtron this matter (*e*). Where there is ſufficient matter before to w an *innuendo* may relate, there it may be aſcertained thereby; now in this caſe there is no precedent matter to which it relate, ſo that the *innuendo* is altogether foreign, and impoſ ſenſe on a man's words which he never meant.

2. Cro. 126.

TURTON, *Juſtice*, of the ſame opinion; and he cited *Palmer*, *Sid.* 118. *Hetl.* 97. 2. *Roll. Rep.* 368. and ſaid, that it does appear to concern the matter in queſtion, or to be material; it been proper to have aſked him what *Newnham* he meant, and have brought it to a certainty; but ſince it is not ſo, the *inn* will not help it; and for that he cited 1. *Roll. Abr.* 83. 2. *B* 81, 82. 1. *Vent.* 339. *Yelv.* 21. 3. *Bulſt.* 150. *Heb.* *Hutt.* 44.

(*a*) 3. Inſt. 164. 167.
(*b*) 2. Bulſt. 150. 11. Co. 115. 1. Cro. 353. Hob. 53. 2. Roll. Rep. 369. Yelv. 111. 2. Roll. Rep. 41.
(*c*) Stiles, 336.
(*d*) Yelv. 111.
(*e*) 3. Cro. 438.

ROK

l ſo it is no more than if he had ſwore *Strode* was at foreſaid.

.Y, With the *innuendo*.

Y, I ſhall conſider the aſſignment of the perjury itſelf; e perjury muſt not have a particular relation to the ıentioned in the *innuendo*.

f the *innuendo* had been omitted, it had not been good; *m* muſt be underſtood a vill, hamlet, or place out If you will aſcertain a vill, you muſt ſhew in what , for otherwiſe it is but an *individuum vagum*, which is n that there needs no authority for it; but however I two, 34. *Hen.* 6. 49. 60. 4. *Hen.* 8. 8. It is true, :s the vill muſt be in that county, by intendment, in ction is brought; as if treſpaſs be in *Middleſex*, and the 2. Co. 96. d in *Iſlington* generally, *Iſlington* ſhall be intended to *leſex*; but in collateral matters, as in this caſe, it is All courts muſt take notice of counties, but not of ills; ſo that if *Newnham* be uncertain, and you aſſign at "*Newnham* aforeſaid," it is all uncertain.

LY, The *innuendo* cannot ſupply that uncertainty, for o ſignifies otherwiſe than is ſignified by the oath: what es not at all import *Mr. Strode*'s being at *Newnham* in *Newnham*, by common intendment, is a vill, and o is of a houſe: no *innuendo* can ſupply the defect of y that was neceſſary before; for a bare and naked *innu-* s nothing, unleſs the words themſelves import the ſame; ſome certain fact to which it may be applied, or from ıay be inferred, that the man meant the thing, without n *innuendo*. There is a very good account in 4. *Co.* 17. f an *innuendo*. If the words be actionable, it will ſerve and is of the ſame uſe as "*præd.*" The caſe of *Miles v.*

THE KING against GRIEPE.

liable to be convicted on perjury on an information. If *Strode* brought an action for ſlandering his title to *Newnham*, and lai in this * manner, as this information is, it would be naught; bu

* [142] ſhould ſay, "that he was ſeiſed in fee of a certain houſe called *Ne* "*ham*, in *Plimpton* in the county of *Devon*, and the defendant ſp "theſe words, *Mr. Strode* has no title to *Newnham*, INNUEN "*Newnham prædictam*," that had been good; for it is a ſuffici averment, and will have relation to what was alledged bef Here you would perjure a man, not for what he ſwore, but what he meant; and yet an *innuendo* is never put in iſſue, or a body put to prove it, for it is but a conſequence of a certain ma alledged before. If it had been ſaid, that there was a debate in common pleas about *Strode*'s being at *Newnham*, in *Plimpto Devonſhire*, then this information *ubi revera*, &c. had been go or if it had ſaid, that *Strode*, of *Newnham* in *Plimpton*, &c. produced as a witneſs, that *Griepe* had ſwore he was at *Newn ubi revera non fuit apud* NEWNHAM *præd.* that had been good, cauſe there is ſomething precedent to which it may relate (*a*). *innuendo* is no averment but only a relation, and there is noth for it to relate to.

As to the aſſignment of perjury, you ſhould have ſaid, "*ubi* "*vera non fuit apud* NEWNHAM *præd. ſeu ad aliquem alium lo* "*ſive hamlettum vocat.* NEWNHAM," then the aſſignment of perjury had bore ſome proportion with his ſwearing.

Objection. It appears by his ſwearing that *Newnham* ſome place different from *Albemarle Houſe*, and he ſwore in c tradiction to *Strode*'s evidence. As to that, I think a falſe any way conducive to the matter in iſſue, or a guide to the j though it be but circumſtantial, is perjury; but for anything appears, this was no contradiction to *Strode*'s evidence, for *Albem Houſe* and *Newnham* may be near one another. If it be ma that tends to the diſcovery of truth, though but a circumſta as that ſuch a one wore a blue coat, whereas he wore a red, perjury; but if he tell an impertinent ſtory nothing to the purp then it is not ſo (*b*). If a man ſpeak to the credit of a wit which is not directly to the iſſue, yet if falſe, that is perjury.

It was further objected, that the *innuendo* ſhall be rejected as pluſage; but that cannot be, for by the *ubi revera* you have pu caſe on his not being at *Newnham* in *Plimpton*, &c. and ſo have

* [143] the *innuendo* ſignificant, * and therefore it cannot be left out.

They objected further, that there was a verdict, but that ca help; for it is againſt the rules of law to put a man's intent in i and what cannot be proved, or put in iſſue, the verdict cannot

(*a*) Snowde *v.* Snowde, 1. Roll. Abr. 78. pl. 3. Allen, 32.

(*b*) At a trial, the queſtion was upon money lent, and it being objected, that it was improbable the plaintiff, being a cautious man, ſhould lend ſuch a ſum without a note; a witneſs was produced to prove that he had lent a great to a perſon then in court, without which perſon ſwore he did not; an motion to file an information of againſt him for the oath, the Cou it reaſonable. Mich 4. *Ann.* in *B* NOTE *to ſome editions.*

Then as to this being an information at common law, there is no reaſon why that ſhould not be as certain as if it were on a ſtatute: the ſtatute makes no new offence, but only gives a new puniſhment in thoſe caſes to which it extends. Perjury at common law was an infamous fact before any ſtatute made; the firſt of which is 11. *Hen.* 7. The puniſhment by ſtatute is much the ſame as at common law, but in ſome inſtances it varies: by ſtatute, if a man pay twenty pounds he ſhall not be ſet in the pillory; but at common law he may, and be fined a greater ſum: it is part of the judgment by the ſtatute, that he ſhould be diſabled from being a witneſs, and that the king cannot pardon; but the ſame certainty is required in both: Therefore let judgment be arreſted.

In the caſe of Rex v. Franklin, Mich. 3. *Geo.* 3. Lord Chief Juſtice *Reymond* ſaid this caſe was reverſed in the houſe of lords.

Terremoulin *againſt* Sandys. Caſe 267.

SANDYS was proprietor of a ſhip called *The Conſtant Mary*, in the year 1689, and ſent her to ſea, where ſhe was taken off of *Yarmouth*, *ſuper altum mare*, by *Dubart* a *Dunkirker*, who ſold her to *Terremoulin*; and after which, the ſhip being at *Spithead*, *Sandys* ſeized her by the admiralty proceſs, whereon there was a ſuit commenced in the admiralty court by *Sandys*, *in cauſâ proprietatis* againſt the ſaid ſhip; and then *Terremoulin* came in *pro intereſſe ſuo*, and ſuggeſts that the ſhip was his, and that he had been in poſſeſſion of her three years laſt paſt, and prayed his poſſeſſion might be reſtored; whereupon *Sandys* put in his libel, that he was poſſeſſed of the ſaid ſhip divers years until 1689; that then the ſaid ſhip was forcibly taken away from him, without ſaying *ſuper altum mare*, and thereupon prayed reſtitution. *Terremoulin* comes in and replies, that the ſhip was taken by *Dubart ſuper altum mare*, who ſold it to him at *Bergen* in *Norway*. *Sandys* rejoins, that after the taking, the ſhip was never condemned prize, and ſo his property ſtill continued. According to which, after examination of the caſe, the admiralty gave judgment for *Sandys*; for a capture without condemnation alters not the property by their law; whereupon *Terremoulin* appealed to the Delegates;

Libel did not ſhew that the capture of a ſhip was *ſuper altum mare*; the ſubſequent proceedings did; and the Court divided whether prohibition ſhould go.

S. C. Comb. 462. S. C. Carth. 423.

1. Vent. 308.

Ante p. 135.

And now, againſt his own appeal, prayed a prohibition.

Ante p. 134.

* HOLT, *Chief Juſtice*. The libel does not ſay, that the violent taking away was at ſea; and if it was not, what have the admiralty to do with it, and how can it be cured by any ſubſequent matter? for if the admiralty have not conuſance of the original cauſe, though a civil law queſtion ariſe, they ſhall not have juriſdiction; and if they have juriſdiction, and a common-law queſtion ariſe, yet they ſhall determine it.

* [144]

Ante p. 135. 1. Vent. 174. 308.

And by HOLT, *Chief Juſtice*, and ROKEBY, *Juſtice*, a prohibition ſhould go, becauſe the libel was a bare replevin at common law.

But TURTON and EYRE, *Juſtices*, held otherwiſe; becauſe it appeared by ſubſequent allegation, that the capture was *ſuper altum mare*.

And ſo the rule for a prohibition was diſcharged.

Caſe 268.

Sutton *againſt* Moody.

Property of things *feræ naturæ* is in the owner of the ſoil, while they are there.

TRESPASS *quare clauſum fregit et ibidem venatus eſt et canes ſuos cepit.* Verdict for the plaintiff and intire damages given.

S. C. 5. Mod. 375.
S. C. 2. Salk. 556.
S. C. Comb. 458.
S. C. 3. Salk. 290.
S. C. Holt, 608.
S. C. Ld. Ray. 250.
S. C. Comy. Rep. 34.
Juſt. Inſt. Lib. 1. Tit. 1. ſ. 12.
5. Co. 104.
7. Co. 17.
Godb. 123.
Cro. Jac. 195.
3 Lev. 227.
14. Viner, 439.
18. Viner, 72.
2 Bac. Abr. 613.
2. Bl. Com. 419.

AND MOVED *in arreſt of judgment*, that the count was ill; becauſe the owner of the ground has no property in the conies, and therefore cannot be ſaid *ſuos*; and cited 1. *Cro.* 553.

But ON THE OTHER SIDE *it was ſaid*, that precedents were both ways; and cited 1. *Brownl.* 167. *Godb.* 174. *Newton* v. *Richards.*

And by HOLT, *Chief Juſtice*, "*Warrenna*" is a property *ratione privilegii*, and then there is a property *ratione ſoli*, both which properties are local. Now a man may have a warren in another man's ground; as a man may have a warren by grant or preſcription in his own ground, after which he may alien the ground, and reſerve the liberty of the warren; which liberty *ratione privilegii* deſtroys, or rather ſuſpends the privilege *ratione ſoli*; ſo that the property of the conies is in him that has the warren; whereas otherwiſe the property of the conies, whether wild or tame, is in the owner of the ground where they are, while they continue there, as much as if he had a warren, the warren making not the conies to be more or leſs his; the privilege of a warren only giving a man liberty to employ his ground in the keeping of conies, which otherwiſe he cannot do.

Judgment for the plaintiff (*a*).

(*a*) See Keeble *v.* Hickeringle, 3. Salk. 9. 11. Mod. 73. 130. Holt, 14. 17. 19. where this caſe was quoted and agreed for law.—NOTE *in ſome edition.*

* [145]

Caſe 269.

* Sutton *againſt* Moody.

2. Eulſt. 60.
1. Brown, 224.
Latch, 120.
Cro. Jac. 324.
Poph. 162, 163.

HOLT, *Chief Juſtice*. When we gave judgment in this caſe, I mentioned 12. *Hen.* 8. *fo.* 9. which was this: One hunted in a foreſt and rouſed a deer therein, and ran him into another man's ground, and the foreſter made freſh purſuit; and it was held, that in regard the foreſt was a place of privilege, the foreſter making freſh purſuit, he may retake the deer in another man's ground. They held alſo, that if a man ſtart game in his own ground, and hunt it into his neighbour's ground, and there kill it, yet in regard of his firſt ſtarting and purſuit, the property is ſtill in him; and it may be inferred from that caſe, that if I ſtart game in one man's ground which is not my own, and hunt it into another man's ground, and there kill it, the property is in me; becauſe the party in whoſe ground it was ſtarted, having no privilege, he cannot come and take it (*a*). I will alſo remind you of a caſe, in *Eaſter Term*, in the

(*a*) See the caſe of Gundry *v.* Feltham, "that a perſon may juſtify a treſpaſs in following A FOX with hounds "over the grounds of another, if he does "nothing more than is neceſſary to kill "the fox." 1. Term Rep. 334.

twenty-

hird year of *Charles the Second*, *Aſhford v. Pollexfen (a)*, urt: Treſpaſs *quare piſcatus eſt in piſcariâ*, without ſaying r *liberâ*, and *piſces ſuos cepit*, which after verdict was held ough in a ſeveral piſcary, the fiſh are as much at liberty on any common ground. SUTTON *againſt* Moody.

(*a*) 3. Lev. 227.

Greenhill *againſt* Sheppherd. Caſe 270.

COURT. If the defendant plead a plea in abatement, the plaintiff confeſs it, the plaintiff thereby ſaves coſts. If plaintiff confeſs a plea in abatement, he ſaves coſts.

ell *againſt* The Cenſor of the College of Phyſicians. Caſe 271.

PASS for a falſe impriſonment. The defendant pleaded *recordatum exiſtit in ſcriptis*, &c. that he was convicted *praxi* before them, for which they committed him to , &c. Where a thing is not by law to be ſhewn in court, *oyer* cannot be demanded of it, or a copy.

IT WAS NOW MOVED *for the plaintiff*, that they might ght and a copy of the conviction, for otherwiſe it would ible for them to reply; for ſeeing they had not pleaded a hey could not have *oyer*. S. C. 1. Ld. Ray. 252. 1. Barnes, 250. Dougl. 215. 460. Stra. 1034. 1. Term Rep. 149.

, *Chief Juſtice*. We are of opinion, we cannot oblige to do; becauſe it would be contrary to all * rule; for eleaſe or other thing is pleaded, and it is not by law to be court, there you cannot crave *oyer*, or demand a copy And this is different from the caſe of copies of court-roll, of a corporation; for if an iſſue be to be tried concern- pyhold, the copyholder ſhall take copies of the rolls; be- has an intereſt in the rolls of the manor to make out his of an action of a falſe return againſt a corporation, when turned out, the books of the corporation are public things, ern him, and therefore on a trial he has liberty to take If you think the conviction in this caſe not juſtifiable, remove it hither by *certiorari*. * [146]

Poſtea Paſch. 12. *Will.* 3. Dr. Greenville *v.* College of Phyſicians.

mb *againſt* Sir Owen Buckingham, and Mills (late Sheriff of London), and Croſſe. Caſe 272.

CASE was this: One *Fox* was indebted to the plaintiff, gave him a judgment; upon which a *fieri facias* was t, which bore *teſte* the thirty-firſt of *January*, and was The firſt *fieri facias*, delivered to the ſheriff, ſhould be firſt

but if he execute the laſt firſt, the execution is good; and the party muſt have his remedy heriff.—S. C. 5. Mod. 376. S. C. 6. Mod. 292. S. C. Comb. 428. S. C. Salk. 320. 419. S. C. 3. Salk. 159. S. C. Holt, 302. S. C. 1. Ld. Ray. 251. S. C. Com. Rep. 35.

delivered

SMALECOMB *againſt* SIR OWEN BUCKINGHAM, MILLS, LATE SHERIFF OF LONDON, AND CROSSE.

delivered to the ſheriff the day after; who took *Fox*'s goods in execution thereon, and made a bargain and ſale of the ſame, and the bargainee aſſigned them to the plaintiff; but it happened, that the defendant *Croſſe* took out a *fieri facias* againſt the ſame *Fox*, teſted after the plaintiff's, but delivered an hour before his, on which the ſheriff took in execution the goods of *Fox* ſo bargained and ſold, and in the plaintiff's hand, for which he brought trover.

This caſe was tried at *Guildhall*, and A CASE was made of it, to have the opinion of the Court.

3. Com. Dig. 308.
2. Bac. Abr. 352. 456.
4. Bac. Abr. 460.
10. Viner Abr. "Execution" (A.) pl. 18.
11. Viner Abr. "Execution" (Q. a. 2.) pl. 14.
Vin. Abr. "Time" (A. 3.) pl. 16.
1. Burr. 16.
4. Term Rep. 412.

AND THEY ALL AGREED, that if there be two *fieri facias*'s, and one be delivered to the ſheriff one day, and the other another day, and the ſheriff firſt executes the laſt *fieri facias*, that the execution is good, and the ſale thereupon good; and he who delivered his firſt muſt have his remedy againſt the ſheriff, becauſe otherwiſe the conſequence would be miſchievous, and the execution of the law would be perilous to buyers; the meaning of binding of the goods by a *fieri facias* being only in relation to the party himſelf, and not only to the execution of the law: As ſuppoſe, before the ſtatute, a man took execution the firſt day of the Term, and within a week after another took out a ſecond *fieri facias* againſt the ſame perſon, teſted a week after, and he that has the firſt *fieri facias* will keep it in his pocket, and the other goes * and delivers his to the ſheriff, and gets it executed, is it any reaſon that he who had the firſt ſhall come and defeat thereby the execution of the ſecond? but if he deliver it to the ſheriff, and the ſheriff execute the ſecond, and omit the firſt, then may he have his remedy againſt the ſheriff for the wrong done him. Now here in this caſe, we doubt not but upon this ſtatute there is a *prius et poſterius* in a day; and that if the two *fieri facias*'s are delivered to the ſheriff on one day, he has not election, but ought to execute the writ firſt delivered to him; but if the ſheriff does execute the laſt firſt, the execution is good, and he who had the firſt writ muſt have his remedy againſt the ſheriff, if he has done him any wrong thereby; though we do not think he has done him any in this caſe, becauſe he who had the firſt writ never deſired any warrant from the ſheriff; and it is plain, it was deſigned purely as a ſcreen to preſerve the party from the execution of the ſecond *fieri facias*.

* [147]

Therefore let the plaintiff have his judgment.

Caſe 273.

Winter *againſt* Lovedurr.

Copyhold lands are parcel of the demeſnes of the manor.

S. C. 2. Salk. 537.

EJECTMENT. Special verdict, that the lands in the declaration are cuſtomary lands, part of the manor of *G.* demiſable time out of mind by copy of court-roll, for life or lives at the will of the lord, according to the cuſtom of the manor; that *George Pawlett, Eſq.* was ſeiſed of the ſaid manor in fee, and had iſſue

S. C. Comb. 371. S. C. Carth. 427. S. C. 5. Mod. 244 378. S. C. Holt, 414. S. C. 1. Ld. Raym. 267. S. C. 1. Freem. 507. S. C. Comy. Rep. 37.

Edward

WINTER against LOVEDUAR.

ard Pawlett; that the ſeventh of *January*, in the ninth year *ames the Firſt*, *George Pawlett*, by deed indented between and *Elizabeth* his wife on the firſt part, *Hugh Worth* of the id, and *Dorothy Worth* his daughter on the third part, in con- ation of a marriage to be had between *Edward Pawlett* and *thy Worth*, and of a portion to be paid, conveyed the ſaid ma- and divers other lands in *B.* and *S.* to the uſe of himſelf for ; then to *Edward Pawlett* in tail; remainder to him and his right heirs; with this proviſo (whereon the queſtion depends), at it ſhall be lawful for the ſaid *George Pawlett*, during his natu- life, and after his deceaſe to the ſaid *Elizabeth* his wife, during r life, by their ſeveral deeds indented, to demiſe the ſaid lands, or y part thereof, either in poſſeſſion for one, two, or three lives, or the term of thirty years, or *for* any other term or number of ars determinable on one, two, or three lives, or in reverſion for e or two lives, or for * the term of thirty years, or for any other m or number determinable on one or two lives, ſo as the ſaid miſe ſhall not be made of any *antient demeſne* lands parcel of the emiſes, or of any other lands which for the ſpace of ſeven years t paſt have been uſed as the *demeſne lands* of the manor, and ſo as antient rent be reſerved." They find, that the marriage between *ard* and *Dorothy* took effect; that *Edward Pawlett* had iſſue daughters, and no ſon, *viz.* *Mary*, *Anne*, *Sarah*, and *Katharine*; *Mary* married *James Glaſſebrook*, who are the leſſors of the tiff. Then they find, that *George Pawlett*, by indenture wentieth of *March*, in the eleventh year of *Charles the Firſt*, een him and *Robert Blanchflower*, reciting, that *Richard chflower* held the lands in queſtion by copy of court-roll for his life and the life of *Joan* his wife, granted the ſame, in conſi- tion of ſixty pounds, to *Robert Blanchflower*, from and after death, forfeiture, or other determination of the eſtate of *hard Blanchflower* and *Joan* his wife, for the term of thirty s. They find the marriage-money paid; that at the time of the demiſe theſe lands were copyhold lands, parcel of the ſaid manor . They find, that there is a capital meſſuage, and divers acres nd, parcel of that manor, which were always held in demeſne. n they find the death of *George Pawlett*, *Elizabeth Pawlett*, *hard Blanchflower* and *Joan* his wife; that *Robert Blanchflower* red, and was poſſeſſed of theſe lands, by virtue of which he ned to the defendant *Lovedurr*; and then conclude ſpecially.

* [148]

YRE, *Juſtice*. The caſe is but this: A tenant for life, re- nder in tail, of a manor, with power in the tenant in tail of the or to make leaſes in reverſion for one or two lives, or for the of thirty years, or any number of years determinable on one wo lives, ſo that ſuch demiſe be not of the *antient demeſne* s, rendering the antient rent: then the tenant for life makes a of a copyhold eſtate of the ſaid manor for thirty years, to com- ce after the determination of the eſtate of two perſons, whoſe were then upon it.

Cо. Lit. 54. 1. Lev. 168.

Whereupon

WINTER *against* LOVEDURA.

Whereupon the general queſtion is, Whether this be a good leaſe according to the ſaid power? which ſubdivides itſelf into two queſtions.

FIRST, Whether it warrants a leaſe in reverſion for thirty years abſolute?

SECONDLY, Admitting it does, Whether this power warrants a leaſe of copyhold eſtate?

EYRE and TURTON, *Juſtices*. This power warrants a leaſe for thirty years abſolute, becauſe the words themſelves are expreſs, and cannot without force be otherwiſe * underſtood; for the leaſes in reverſion are to be "for one or two lives, or for thirty years, "or for any number of years determinable on one or two lives;" which are three diſtinct limitations, different from each other, and ſo different from *Finche's Caſe* (*a*), the reduplication of the particle "or" making them plainly diſtinct; and if the ſecond paragraph ſhould be connected with the third, then the particularizing of the thirty years would be to no purpoſe, becauſe included in the general term of "any number of years."—Then as to THE SECOND QUESTION, we are of opinion, that this power does not warrant the leaſing of the copyhold lands, being reſtrained with the "*ita quòd* ſuch de-"miſe be not made of the *demeſne lands*," becauſe the copyhold lands are part of the *demeſne lands* of a manor, the freehold being in the lord, and the copyholders only tenants at will; and therefore if the lord alien his manor, there needs no more attornment of the copyholders than of the tenants at will (*b*). The lord has as much the demeſnes of a copyhold as of that which is in his own hands actually (*c*). Wherefore by reaſon of this laſt point judgment ought to be given for the plaintiff.

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ROKEBY, *Juſtice*. I concur that the leaſe is not good, but from different premiſes; for as to the queſtion, Whether copyhold land be included within the *demeſne lands*, I agree it to be ſo; not becauſe copyhold lands are in law within the *demeſne lands* of the manor, for in vulgar ſpeech ſometimes they are not ſo, but becauſe to underſtand them otherwiſe would contradict the intention of the parties, which without doubt was not to deſtroy the copyholds, as ſuch leaſes for years would do.—Then as to THE OTHER QUESTION; An abſolute leaſe for thirty years in reverſion is not warranted by this power, becauſe then a better leaſe might be made in reverſion than poſſeſſion. If leaſes ſhould be made of copyholds in this manner, the manor would be deſtroyed, which could never be intended; and all powers ought to be taken ſtrictly, according to the caſe of *Slocomb v. Hawkins* (*d*). And therefore judgment for the plaintiff.

(*a*) 6. Co. 39.
(*b*) Litt. ſect. 553. Co. Lit. 311. a.
(*c*) Cro. Jac. 559. 4. Co. 26.
(*d*) Yelv. 224. Cro. Jac. 328.

HOLT,

, *Chief Juſtice.* The leaſe is not good, for the reaſons of d TURTON, *Juſtices.* Two queſtions have been made: Whether this term be within the power? SECONDLY, theſe lands be within the exception or qualification of the As to the FIRST, I am of opinion, that the term is warranted wer, which depends on the penning thereof; wherein, by plication, it is neceſſary to take notice * what is meant by a verſion. Firſt, In the largeſt ſenſe it is taken for any leaſe to commence *in futuro*, or at a day to come, as 1. *Inſt.* erſion" being there taken in oppoſition to "poſſeſſion." is not meant in this caſe, becauſe then he might make a ommence fifty or ſixty years hence; and therefore this uſt be taken according to the common and ſecond ſignifica- e word, which is a leaſe to commence from and after the tion of a preſent intereſt then in being: as ſuppoſe there for life or years then in being, and a leaſe for years be n the determination of that eſtate, this is a leaſe in rever- : the leaſe in reverſion in this power is not only to be his ſenſe, becauſe it not only extends to a leaſe for years n, but alſo to a leaſe for life in reverſion, or a concurrent the eſtate in being; ſo that theſe words "in reverſion" ſenſes; as to the years it is a future intereſt, as to the ncurrent leaſe. But now as to the leaſe, as this power ; a leaſe in reverſion for thirty years abſolute is good, within the reaſon of *Finch's Caſe* (*a*); nay, there is a in that caſe which confirms my opinion, and the plain f the words can be no other. The ſame words are uſed er, both with reſpect to the leaſes in poſſeſſion and rever- oth which there are three diſtinct powers perfectly diffe- each other; and repeating the word "for" wholly diſ- former and the latter part. *The King v. Lewis* (*b*) and *v. Robotham*, cited in that caſe, are pertinent to this nd prove, that ſubſequent words ſhall not control general ones, but that they ſhall both be conſtrued as general and nt clauſes.—But then as to the SECOND POINT; I hold to be within the exception or qualification of the power; *demeſne lands* generally are excepted, and without doubt lands are parcel of the demeſnes (*c*). It would have aſonable that the tenant for life ſhould have power to e manor for ever; the meaning here was to have power eſtates, renewing the antient rents. Copyholds needed wer, becauſe cuſtom enables you to demiſe them. But ed, that if the copyhold lands ſhall be conſtrued to be then there is nothing left for the power to work upon; ling to the power, the antient rent muſt be reſerved; or only conſiſts of demeſnes and ſervices; and if you the * demeſnes by the exception, you have nothing for to work upon, becauſe a rent cannot be reſerved out of s. But as to that I anſwer, there are other lands out of

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(*c*) 1. Co. 46.

. 39.
. 119.

which

WINTER *againſt* LOVEDURR.

which a rent may be reſerved, as the lands in *B. &c.* and even as to the manor, the power is not wholly void, for he may thereby loſe the rents and ſervices, though no rent can be reſerved thereout; for where a man reſerves a power to make leaſes of divers lands and tenements, and other things, and there is a qualification in the power which extends not to all comprehended in the power, that part of the power may be executed without purſuing the qualification; ſo is 2. *Roll. Abr.* 262. A man made a ſettlement to the uſe of himſelf for life, with remainder over, and a power to make leaſes, reſerving ſo much rent as was reſerved two years before the making of this ſettlement; the man made a leaſe of lands not demiſed for twenty years before; and this leaſe was held good, and to be within the power, and that he might reſerve what rent he would; becauſe though the qualification was in general words, yet it could only be applicable to ſuch lands as were demiſed. On the authority of this caſe was determined another, in *Hilary Term*, in the twenty-ſeventh and twenty-eighth year of *Charles the Second*, in HALE's time, *Walker v. Walker* (*a*): A man made a ſettlement of lands, and alſo of tithes, with A PROVISO of making leaſes in poſſeſſion or reverſion of all or every part of the premiſes, reſerving five ſhillings rent for every acre; he made a leaſe of the tithes, reſerving about five pounds a-year; the queſtion was, Whether this was a good leaſe of the tithes within the power? and held, that a leaſe of the tithes was good, without reſerving any rent at all, becauſe the general words of the qualification ſhould be reſtrained to that only to which it was applicable: ſo in this caſe, though the qualification cannot operate on a leaſe of the rents and ſervices, becauſe no rent can be reſerved thereout; yet the power itſelf may operate thereon, and the qualification be extended to thoſe other things to which it is applicable.

Therefore judgment was given for the plaintiff.

(*a*) 1. Vent. 294. 2. Lev. 150.

*[152]

Caſe 274.

Turberville *againſt* Stamp.

Caſe for negligently keeping his fire.

S. C. 1. Salk. 13. S. C. Comb. 459. S. C. Carth. 425. S. C. Skin. 681. S. C. Holt. 9. S. C. 1. Ld. Ray. 264. S. C. Ray. Ent. 375. S. C. Comy. Rep. 32. 1. Com. Dig. 209.

ACTION UPON THE CASE on the cuſtom of the realm, for negligently keeping of his fire; declaring that the plaintiff was poſſeſſed of a cloſe of heath; that the defendant poſſeſſed of another cloſe next adjoining; and that the defendant * *tam improvide cuſtodivit ignem ſuum* in his field, that it burnt the plaintiff's heath in his field. After verdict for the plaintiff,

IT WAS MOVED *in arreſt of judgment*, that ſuch an action on the caſe lies only for a negligent keeping his fire in his houſe (*b*); and that in this caſe he ſhould have his action ſpecially, if he be damaged, and not count on the general cuſtom for negligence.

TURTON, *Juſtice*. There is difference between fire in a man's houſe and in the fields: in ſome countries it is a neceſ-

(*a*) By 6. *Ann.* c. 3. no action ſhall be maintained againſt any, in whoſe houſe or chamber any fire ſhall accidentally begin. But this ſhall not affect any covenant on this ſubject made between landlord and tenant.

ſary

r part of huſbandry to make fire in the ground; and ſome un- TURBERVILLE
idable accident may carry it into a neighbour's ground and do *againſt*
ury there; and this fire not being ſo properly in his cuſtody as STAMP.
: fire in his houſe, I think this is not actionable, as it is laid.

But by HOLT, *Chief Juſtice*, ROKEBY and EYRE, *Juſtices*, very man muſt ſo uſe his own as not to injure another. The law general; the fire which a man makes in the fields is as much his as his fire in his houſe; it is made on his ground, with his materials, and by his order; and he muſt at his peril take care that it es not, through his neglect, injure his neighbour: if he kindle at a proper time and place, and the violence of the wind carry it to his neighbour's ground, and prejudice him, this is fit to be ven in evidence. But now here it is found to have been by his gligence; and it is the ſame as if it had been in his houſe.

Judgment was given for the plaintiff.

Giles *againſt* Hart.

Caſe 275.

NDEBITATUS ASSUMPSIT and *quantum meruit* for goods ſold, wherein a requeſt was laid, both as to time and place. The fendant pleaded *non aſſumpſit* to all except thirteen pounds, and to that pleads, that after the time of making the promiſe, *viz.* the enty-ſecond of *April*, which was before the time of the requeſt edged, he tendered the ſaid thirteen pounds, which the plaintiff en and there refuſed to receive; and that from that day he was ways ready to pay the money; and brings it into court.

Tout temps priſt cannot be pleaded after imparlance.

S. C. a. Salk. 622.
S.C. Comb. 443.
S.C. Carth. 413.
S. C. 3. Salk. 343.
S. C. Holt, 556.
S.C. 1. Ld. Ray. 254.
Ante, 8. 20.
Viner, 307.
Fort. 376.
Sayer, 18.
Cl.ſt. 203.
Lutw. 227.
Barnes, 343. 354.
1. H. Bl. Rep. 369.

The plaintiff demurred, alledging, that ſuppoſe a tender might : pleaded in bar of an *aſſumpſit*, yet it is not good, without anering the ſpecial requeſt alledged, which is not done in this aſe.

HOLT, *Chief Juſtice*. We are all of opinion, that the defendant's plea is ill, becauſe the defendant ſhould plead that he was lways ready from the time that the money was due, which he cannot after imparlance. It is not material for the plaintiff to ſet forth a time of requeſt until he comes to his replication; and when he defendant ſays he was always ready, that puts the plaintiff in his eplication to ſhew a ſpecial requeſt, and that the defendant did not hen pay him, and ſo the plaintiff muſt have his damages. The way in debt is, for the defendant in all theſe caſes to plead *tout temps priſt* before imparlance, and pray *judicium de damnis*. And ſince actions of debt are turned into actions upon the caſe, it is but reaſonable the defendant ſhould ſtill have the ſame advantages: but then the queſtion is, how he ſhall plead; whether in bar of the action, demanding judgment *ſi actio*, or in bar of the damages, praying *judicium de damnis*. Now it is reaſonable in debt to pray it in bar of damages, becauſe there the damages are but acceſſary; but now in an *aſſumpſit* damages are the principal; therefore why ſhould it not be thus pleaded, *viz.* to confeſs the damages due, and bring them into court, and pray *judicium de ulterioribus damnis*.

Indeed

Giles *againſt* Hart.

Indeed nobody hath ventured to plead thus, but have choſe rather by motion to bring the money into court; but however the right method be, the defendant in this caſe has pleaded ill; and therefore

Judgment was given for the plaintiff.

Caſe 276.

Anonymous.

Error in the exchequer chamber on judgment for the defendant in the king's bench.

IF JUDGMENT be given for the defendant in the king's bench and a writ of error be brought thereon, and judgment reverſed in the exchequer-chamber, the exchequer-chamber muſt give the interlocutory judgment *quòd quer. recuperet*, and this Court award the writ of enquiry of damages; and ſo is the caſe of *Fold* v. *Ridge* (*a*).

Cro. Eliz. 306. 1. Salk. 262. 401. 2. Saund. 256. Stra. 971. 4. Mod. 125. 1. Ld. Ray. 6. Barr. 2156. 2456. Dougl. 350. 752.

(*a*) Yelv. 74. Cro. Jac. 206.

Caſe 277.

Aſhton *againſt* Sherman and his Wife, Adminiſtrators of Field.

Pleading ſix judgments confeſſes aſſets for above five; and if the plaintiff in his replication conclude to the country, it is ill.

DEBT ON A BOND OF THE INTESTATE'S. The defendants plead, that *Field* the inteſtate, on the fifth of *July*, in the fifth year of the reign of *King William and Queen Mary*, became indebted in one hundred pounds to *Richard Wareing*; for which *Wareing* had a judgment of one hundred pounds and thirty ſhillings coſts, and alſo a judgment to one *Axtell*; and they ſet forth ſeveral other judgments and bonds, and that they have not aſſets *ultra*. The plaintiff replies ſeverally to every of the ſaid judgments, and as to ſix of them pleaded they were kept on foot *per fraudem*, and as to the two judgments of *Wareing* and *Axtell*, that the defendants had aſſets to ſatisfy him, beſides goods to ſatisfy *Wareing* and *Axtell*, *de ſeparalibus debitis et damnis ſuis prædictis verſus ipſos* JOHANNEM SHERMAN *et* MARIAM * *uxorem ejus, ſicut præfatur, recuperat.*; *et hoc petit quòd inquirat. per patriam.* Whereupon the defendant demurred ſpecially, becauſe the replication was double. The plaintiff joined in demurrer (*a*).

* [154]

6. C. Comb. 444. 449. S. C. Carth. 429. S. C. Salk. 298. S. C. Lilly. Ent. 158. S. C. Holt, 308. S. C. 1. Ld. Ray. 263. 3. Lev. 311. 368. Ld. Ray. 678. 1. Saund. 337. Comy. Rep 205. Cowp. 133. 4. Bac. Abr. 120. 5. Com. Dig. "Pleader" (F. 16.).

HOLT, *Chief Juſtice*, delivered the opinion of the Court, and ſaid, in this the defendant executor has pleaded in bar ſeveral judgments; the plaintiff has replied to them ſeverally, which he may well do, for he may at his election reply to one, ſome, or all. But then the plaintiff has not done well in this; he has pleaded to ſome judgments that they were kept on foot by fraud; and as to the other, that he has aſſets *ultra*; *et hoc petit quòd inquiratur per patriam*; and concluding to the country is naught, becauſe the defendant has confeſſed by his plea already that he has aſſets *ultra* thoſe judgments: as for inſtance; a man pleads three judgments, the plaintiff replies as to two that they are kept on foot by fraud;

(*a*) See the pleadings in Lilly's Entries, 158. under the ſame title as this caſe.

all

the third, that the defendant has aſſets *ultra*; *et hoc petit quòd ratur per patriam.* In this caſe, firſt, ſaying aſſets *ultra* is not , becauſe it is only an allegation of that which he has already eſſed; for by pleading three judgments he confeſſes aſſets above ; and then driving him on to an iſſue is ill: for the ſame rea- herefore you ſhould have omitted the aſſets *ultra*, and the con- on to the country, and relied on the other judgments, that they kept on foot by fraud; or you ſhould have ſaid generally ets *ultra*; *et hoc paratus eſt verificare.*" It might have been ted as ſurpluſage; but here you have driven them to an ill which cannot be good. But becauſe the precedents have this way, as in the caſe of *Hancock v. Proud* (*a*), we will the plaintiff leave to diſcontinue, paying coſts.

ASHTON *againſt* SHERMAN AND HIS WIFE, ADMINISTRATORS OF FIELD.

ter which, by conſent of parties, a rule was given that the tiff ſhould have leave to amend, paying coſts.

(*a*) 1. Saund. 336.

The King *againſt* Lambert.

Caſe 278.

)TION was made laſt Term for filing an information againſt *Lambert* for ſubornation of perjury, on an affidavit of his hav- borned two perſons; but the rule was drawn up generally, and ormation was filed for ſuborning thoſe two, and ten others.

Every ſubornation of perjury is a diſtinct offence.

was moved, that this information was not duly filed, becauſe ldition of ten more were ten more informations.

ıd THE COURT declared, that no information ſhould have been but as to thoſe perſons mentioned in the affidavits; every ormation is a diſtinct offence; and the act for information does * [455] rect an affidavit; yet the Court being truſted with it, and the ment repoſing in them, they ought to do it on good grounds.

HEN IT WAS MOVED, that the information was ill as to thoſe ns, becauſe the ſtatute requires *a recognizance* to be entered o the party, which they had not done.

Information filed without recognizance entered into by the party is ill; but the Court cannot take it off the file.

which alſo THE COURT agreed.

t a doubt aroſe, what ſhould be done with this information is now filed.

LT, *Chief Juſtice*, ſaid, it could not be quaſhed or taken off file; for when once a thing is on the file, it cannot be taken thout an act of parliament; no, not by conſent of parties; as caſe of *Dr. Widdrington* on a *mandamus* (*a*): The College a very ſcandalous return, and which he and the College d; and then they moved to take the return off the file; HE COURT refuſed it, ſaying, it could not be done without of parliament, only they ordered a *vacat* to be entered there- That in this caſe the method may be to enter the irregula- the roll with a *ceſſat proceſſus ſuperinde.*

Curiam adviſare vult.

Keb. 2. 50. 61. 68. 79. 131. 438. 1. Lev. 23. 1. Sid. 71. 68.—See alſo poſt. Hilary Term 12. & 13. *Will.* 3. Rex v. Sir Hugh Everard.

Caſe 279.

Brown *againſt* Burlace.

Temple no privileged place.

S. C. Skin. 684. S. C. 3. Salk. 45. 285. Poſt. 166.

CASE for reſcuing *Burlace*, who was arreſted by the ſheriff of *London*'s officers in the *Middle Temple*.

It was moved, that the *inns of courts* were privileged, as appears from *Dugdale (a)*, and becauſe that *the Temple* is out of the city of *London*, as may be ſeen by *Stow's Survey*.

But *per* HOLT, *Chief Juſtice*, Though *the Temple* be not within the city of *London*, yet it is within the county of *London*, as appears, for that all felonies committed in *the Temple* are tried in *the Old Bailey*; and every place in *England* muſt be within ſome county. Places may be extraparochial, but not out of county. Formerly *Black Fryars* was not within the franchiſe of the city, yet it is and always was within the county of *London*. Bailiffs indeed ſhould not come in to diſturb people when they come to their Counſel, or to enter into chambers to the diſturbance of ſtudy, or danger of papers and evidences that are frequently in Counſel's hands; but then the way is to ſubmit to the proceſs of law, and to apply to the Judges, who will redreſs abuſes of that kind, by laying bailiffs by the heels; but there is no pretence to extend this privilege to ſhelter ill people, as in this caſe: *Burlace* came from

* [156]

* *Gray's-Inn*, but had no certificate from the treaſurer, as ſhould be in all caſes of removal. Beſides, no exemption is good, without ſetting up a juriſdiction to do juſtice.

8. Jo. 271.

Let the defendant find ſpecial bail (*b*).

(*a*) Dugdale Orig. Jur. 317. 320. 322. (*b*) See 8. & 9. *Will.* 3. c. 27. ſ. 15.

Caſe 280.

Evans *againſt* Martell.

The property is conſigned by the bill of loading, and not by the invoice.

S. C. 3. Salk. 290. S. C. 1. Ld. Ray. 771.

ACTION againſt the part owners of a ſhip called "*The Upton* "*Galley*," tried at *Guildhall*. Verdict for the plaintiff; and this point was ſaved to the defendants:

One *Harvey* loaded the goods for which the plaintiff brought his action, and conſigned them to the plaintiff by a bill of loading, but the goods appeared, by the invoices, to be *Harvey's*.

The queſtion was, Whether *Harvey* or *Evans* ſhould bring the action?

And THE COURT was of opinion, that the invoices ſignified nothing, but that the conſignment in a bill of loading gives the property, except where it is for the account of another; ſo that if a bill of loading be made to *A.* *A.* has thereby an ownerſhip to maintain an action; but if it be to *A.* for the account of *B.* then *A.* is only *B.*'s factor, and *B.* has the ownerſhip, and muſt bring the

)n ; and in this caſe the action is well brought by the plain- EVANS *againſt* MARTELL.

tle caſe of Knight *v* Hop- , 8. Godfrey *v.* Furzo, ms. 186. Snee *v.* Preſcott, 45. D'Aguillar *v.* Lambert,). Lickbarrow *v.* Maſon, Rep. 63. 1. H. Bl. Rep. 357. Wright *v.* Campbell, 4. Burr. 2046. Jordan *v.* James, 5. Burr. 2680. Soloman *v.* Niſſen, 2. Term Rep. 674. Kinlock *v.* Craig, 3. Term Rep. 119. 783.

The King *againſt* Harriſon and Duke.

Caſe 281.

DEFENDANTS were convicted and outlawed on an infor- ion of perjury, and the exigent filed.

Judgment for a corporal puniſhment not to be given in the abſence of the party.

S. C. Ld. Ray. 267. S. C. Skin. 684. S. C. Comb. 447. S. C. Holt, 399. S. C. 1. Salk. 400. 4. Hawk. ch. 48. ſ. 17. Vide Keyl. Rep. Maugridge's Caſe, ante, 142, 143.

moved, that the Court would pronounce judgment on the ts, ſeeing the proſecutor could go no further.

HE COURT ſaid, they never knew any judgment given for l puniſhment, even in the caſe of an outlawry, in the ab- the party. When a man is outlawed for felony, there is award of execution againſt him until he is brought to the d ſince in this caſe a corporal puniſhment would be part of nce, they could not do it: and upon ſearch SIR SAM. E could find no ſuch precedent.

* [157]

* Weſt *againſt* Cole.

Caſe 282.

'LAINTIFF counted, that the defendant, on the ſixth of y 1695, in conſideration that the plaintiff had provided for the ſpace of one hundred and twenty weeks *tunc præ-* miſed to pay him ſeven ſhillings *per* week; and that the t *poſtea, ſcil.* on the ſixth of *May* 1695, in conſideration plaintiff had found him diet for the ſpace of one hundred ity weeks *tunc præterit.* promiſed to pay the plaintiff *tan- tum mereret* for the ſaid weeks.

Where two promiſes are laid, one well, the other ill; that which is ill laid ſhall not vitiate what is well laid, unleſs it appear to be for the ſame thing.

S. C. ante, 127.

IT WAS MOVED *in arreſt of judgment*, that the defendant is urged for the ſame thing, the one hundred and twenty weeks *antum meruit* being not ſaid to be others from thoſe in the omiſe, as it is uſually ſaid in thoſe caſes.

HE COURT held, that though "*aliis*" be generally ſaid, ; it did not appear they were the ſame, for there is no me laid when theſe one hundred and twenty weeks were, not intend them ſo as to deſtroy a promiſe otherwiſe well

ierefore the plaintiff had judgment.

Caſe 283.

L'Iſle *againſt* Armſtrong.

If a man be indicted of murder, and found guilty of manſlaughter, appeal will lie the ſame ſeſſions; and if by default of the court he has not his clergy, it ſhall not prejudice him.
S. C. ante, 108.
S. C. 1 Kely. 89. 93.
S. C. Trem. 20.
S. C. Skin. 670.
S. C. Carth. 394.
S. C. Comb. 410.
S. C Salk. 60.
S. C. Holt, 63.
4. Co. 40.
Cromp. 101.
Cro. Jac. 282.
* [158]
Yelv. 204.
2. Leon 160.
Salk. 63.
2. Hale, 250.
3. Mod. 156.

APPEAL OF DEATH by *L'Iſle*, as brother and heir, brought by bill at *Carliſle*, and removed into this court by *certiorari*. The defendant pleaded, that the ſame ſeſſion of gaol delivery at *Carliſle* wherein this appeal was commenced, he was tried for the ſame cauſe on an indictment of murder, and found guilty of manſlaughter; and thereon prayed the benefit of his clergy, which was refuſed him there; and the record was removed into this court, where he had his clergy in *Hilary Term* laſt, before the plaintiff prayed he ſhould plead to the appeal. The plaintiff replied, that when this appeal was brought at *Carliſle*, as appears by the record of this court, he requeſted the appellee to plead, but that he refuſed ſo to do.

HOLT, *Chief Juſtice*. "*Autrefois convict*" or "*autrefois acquit*" on an indictment was a bar at common law to an appeal, becauſe no man's life ſhould be endangered twice for the ſame offence; and the Judges proceeding firſt on the appeal was merely diſcretionary, the very preamble of 3. *Hen.* 7. c. 1. ſaying, that it was only an uſage among them ſo to do; which ſtatute obliges the Judges to proceed within the year and day to hear and determine the * indictment, and not to ſtay on the account of an appeal; without ſaying, "to be brought," or "already brought," or whether of both. But, ſay you, Shall he not then anſwer to the appeal? Yes certainly, the ſame ſeſſions. If he plead "not guilty," the Judges may proceed and try him *de novo*, and hang him on the appeal. If he plead *autrefoits convict*, it is no bar: if he will not anſwer over, his ſtanding mute muſt be recorded, and judgment given accordingly, either to be hanged by *nil dicit*, or the *peine fort et dure*. But if you are not ready, and cannot go on with your appeal, I am afraid your appeal will be gone. Neither an acquittal nor an attainder upon an indictment ſhall be a bar to an appeal, as it was at common law, but only the having clergy, which has been extended ſo far, that if a man pray his clergy, and the Court do not give it him, he having done what lies in his power, the delay of the Court ſhall not prejudice him. Now in this caſe there is no prayer made to have his clergy; but, How comes that to paſs? Why, the party was never aſked; and if the Court will not proceed to judgment, and call him down to judgment, he has no opportunity to aſk his clergy; and therefore I think it a good plea in bar (*a*). Of this opinion were the other three Juſtices; and ſo the appellee was diſcharged.

(*a*) See the caſe of Smith Widow v. Taylor, 2. Burr. 2601. determined on the authority of this caſe: and it ſeems to be fully ſettled by this caſe, that a conviction of manſlaughter on an indictment of murder, and the prayer of clergy thereupon may now be pleaded in bar of an appeal of the ſame death, whether ſuch prayer were made upon the party being called to judgment, or not. 4. Hawk. P. C. 7th edit. ch. 36. ſ. 4.

Anonymous.

Anonymous. Caſe 284.

', *Chief Juſtice.* You have four days after THE POSTEA ctually returned to move in arreſt of judgment.

Anonymous. Caſe 285.

URIAM. No motion for a new trial, or to ſet aſide a of inquiry of damages, after motion in arreſt of judg- New trial.

motion for a new trial muſt hin four days excluſive, after a rule for judgment, Dougl. not made within that time, mplaining cannot afterwards the ſubject of a new trial, ep. 436.; but in criminal e the Court have ſeen of or it has appeared to them ſtion of Counſel, that ſub- ce has not been done, they will interpoſe, after the regular time, and grant a new trial, Rex v. Holt, 5. Term Rep. 436. And the General Rule, that the party ſhall not move for a new trial after he has moved in arreſt of judgment, 2. Salk. 647. 1. Burr. 334. extends only to caſes where the party has knowledge of the fact at the time of moving in arreſt of judgment, Bull. N. P. 325. Tidd's Practice, 609.

Anonymous. Caſe 286.

WARD be made by rule of Court, and the party who re-) obey the award abſconds, ſo that he cannot be found on ıy, a ſervice thereof on a *Sunday* is ſufficient to bring him mpt, whereon to have an attachment (*a*). Notice of an award on *a Sunday* is good, if the party cannot otherwiſe be ſerved.

Whitchurch's Caſe, 1. Atk. ıe party cannot be appre- hended on the attachment on a *Sunday*, Cowp. 136. 1. Term Rep. 366.

HILARY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 287.

* Meggott, Aſſignee of Commiſſioners of Bankrupts Watſon, *againſt* Mills and Waine.

An *inn-keeper* may be a bankrupt.

IT was ſaid by HOLT, *Chief Juſtice*, and not denied by the COURT, that *an inn-keeper* cannot be a bankrupt, but that *victualler* may (*a*).

A commiſſion of bankruptcy may be taken out againſt a perſon who had left off trade, on a debt contracted while in trade.

And if a man contract debt while he is a dealer, and afterwards leave off his trade, and then commit an act of bankruptcy, that none of his creditors, becoming ſo ſince the leaving off of his trade, can ſue out a commiſſion of bankruptcy; but if thoſe who were his creditors before his leaving off his trade, ſue out ſuch commiſſion, the other creditors may come in and join (*b*).

S. C. 1 Ld. Ray. 286.

In this caſe there being ſome diſagreement about the fact, it was ordered to be tried again.

(*a*) March, 34. Cro. Car. 395. W. Jones, 437. 3. Mod. 327. 1. Show. 96. 268. 3. Lev. 309. Carth. 149. Comb. 181. Salk. 109. 2. Wilſ. 382. Burr. 2064. 1. Term Rep. 572. 1. Brown C. C. 177.

(*b*) 1. Vent. 5. 3. Mod. 1. Show. 268. Dougl. 284. Com. B. L. 17.

Joint

Jones *againſt* Morley.

Caſe 288.

4. Jac. Roll. 76.

JECTMENT of the manor of *Franſham*; ſpecial verdict: *Anne Bowyer* was ſeiſed in fee of the lands in queſtion, and ng ſo ſeiſed, by indenture of leaſe and releaſe dated the twenty- ond and twenty-third of *July* 1664, reciting a marriage intend- to be had between *Edward Morley* and herſelf; and in con- ration that *Edward Morley* had agreed to ſettle on her, for a ture, ſo much of the manor of *Barnham*, and other his eſtate *Suſſex*, as ſhould amount to the clear yearly value of three hun- d pounds *per annum*, at the time of the ſettlement, during her , grants *Franſham* to *Sir William Morley* and to *J. N.* in fee, the uſe of herſelf in fee, till marriage * and ſuch ſettlement de; then to the uſe of *Edward Morley* in fee. The jury find t the marriage took effect, and that after the marriage another enture, on the twenty-ninth of *January*, in the ſeventeenth r of *Charles the Second*, was made between *Edward* and *Anne* wife of one part, and *Jones* and *Truſher* on the other part; re- ing therein, that a fine was already acknowledged, and agreed to levied next *Hilary Term*, to be to the uſe of *Edward Morley* in ; and that two days after, *viz.* the thirty-firſt of *January*, by ther indenture between *Edward Morley* of one part, and *Anne* wife on the other, they covenant to revoke, annul, and make d all contracts and agreements between them, or any other for m, till the marriage covenant ſhould be performed. The jury d a fine was levied *Octabis Purificationis* 17. & 18. *Car.* 2. 1665; t the three hundred pounds a-year was never ſettled, but that o hundred and fifty pounds a-year was, charged with a rent of een pounds; that the two hundred and fifty pounds was in part her jointure; that on the ninth of *July*, in the eighteenth year *Charles the Second*, *Edward Morley*, by leaſe and releaſe, did rtgage to *Doble* the lands in *Franſham* in fee for ſix hundred and ty pounds; that in the nineteenth year of *Charles the Second*, *ward Morley* died, and his wife *Anne* ſurviving entered into the hundred and fifty pounds *per annum*, and enjoyed it during her ; that *Doble* aſſigned his mortgage to one, in whoſe right the ndant claims, as alſo as heir to *Edward Morley*; that *Anne* died, that the leſſor of the plaintiff claimed as her heir.

Where conveyance enures by way of tranſmutation of poſſeſſion, the uſes may be declared without deed, elſe not.

* [160]

S.C. Comb. 429. S. C. 4. Mod. 261. S. C. 2. Salk. 677. S. C. Comy. 29. 47. S. C. 1. Ld. Ray. 287. S. C. Carth. 410. S. C. Holt, 321. S. C. Show. P. C. 140. 2. Roll. Abr. 788. 793. Co. Lit. 111, 112. 9. Co. 11. 5. Co. 26. Cro. Jac. 29. Poph. 4. Moor, 107. 788. Cro. Eliz. 218. 300. Lutw. 226. 3. Peer Wms. 206. 6. Com. Dig. "Uſes" (D.) (D. 3.). 5. Bac. Abr. 356. 358.

HOLT, *Chief Juſtice*, delivered the opinion of the Court, and , the general queſtion in this caſe was, Whether the fine levied *ab. Purificationis* 1695, were to the uſe of the huſband and his rs, or of the wife and her heirs? And we are all of opinion, t the fine was not guided by the deed of the twenty-ninth of *uary*, but controuled by the writing between huſband and wife the thirty-firſt of *January*. I ſhall premiſe three things to be en as granted.

FIRST, If there be a deed to levy a fine to ſuch and ſuch uſes, ch a time to ſuch perſons, and in purſuance thereof a fine is

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levied to the ſame perſons, and at the ſame time, the fine ſhall not be averred to be to other uſes by any parol averment, or writing, which is not a deed, but by a ſubſequent deed it may; but if the fine varies in any circumſtances from the deed, the parties are at liberty to aver that the fine was to other uſes different from the deed; and ſo is *Lord Cromwell's Caſe (a)*, and the *Earl of Rutland's Caſe (b)*.

* [161]

SECONDLY, Though the fine vary from the deed, and be levied at another time, or to other perſons, yet if nothing appear * to the contrary, this fine ſhall, by conſtruction of law, enure to the uſes contained in the deed.

THIRDLY, If this fine had been levied according to the deed of the twenty-ninth of *January*, the uſes thereof could not have been controuled by the writing of the thirty-firſt of *January*; for though the deed of a *feme covert* could not be binding, yet being relative to a fine it gives an efficacy and operation to the deed, and is as concluſive as if ſhe were a *feme ſole*.

Having premiſed theſe things, I ſay this fine is not to the uſe of the deed of the twenty-ninth of *January*, but is controuled by the writing of the thirty-firſt of *January*. And firſt, this fine varies from the fine agreed on to be levied by the deed of the twenty-ninth of *January*, for that fine was not to be levied the ſame *Hilary Term* as this was, but the next *Hilary Term*, which was *Hilary* twelvemonth, and ſo this fine was levied before the time in the deed; and thus varying from it, leaves room for an averment that it was levied to other uſes. There is a difference between a fine varying from the precedent deed, and a ſubſequent deed declaring the uſes of a precedent fine or recovery, *viz.* that in the latter, though all ſtrangers might, before the ſtatute 29 *Car.* 2. c. 3. of Frauds and Perjuries, have been let in to aver a parol agreement, prior to a ſubſequent deed, yet the conuſor, or recoveror, or his heirs at law, cannot aver againſt a ſubſequent deed, that the fine or recovery was to other uſes than thoſe contained in the deed, they being eſtopped by the deed; but if the deed be precedent, and the fine and recovery vary therefrom, no parties are eſtopped. Now as this fine varies from the deed, and thereby lets in an averment, ſo here is an expreſs declaration of a uſe, by the writing of the thirty-firſt of *January*, that the fine ſhould be to other uſes; and it was reaſonable ſhe ſhould be ſatisfied that her huſband would make a reaſonable proviſion for her, and therefore might expect ſuch a declaration as this; and this new agreement was ſufficient to declare the uſe of the fine. There are ſeveral ways in the law for declaring of uſes, whether upon tranſmutation of poſſeſſion, or without it. If an uſe be declared to be on tranſmutation of poſſeſſion, as in a fine or feoffment, there needs no agreement whatſoever;

(*a*) 2. Co. 69. S. C. Jenk. 252. S. C. 2. And. 69. S. C. Moor, 471. S. C. Sackvill, 115. Co. Lit. 103.

(*b*) 5. Co.

rgain and ſale were made of a man's lands on the payment
, the uſe would have raiſed, without deed, by parol. But
was in conſideration of blood, then it could not ariſe by
:ement, without a deed; becauſe that agreement was not
ıg agreement, it wanted a conſideration; and therefore
t an obliging agreement, there was a neceſſity of a deed:
: there was a tranſmutation of poſſeſſion, there needed no
only the bare appointment of the party. Now in this
: was a tranſmutation of poſſeſſion; and this writing of
nd and wife of the thirty-firſt of *January*, though it be
yet it ſufficiently ſhews the intention of the wife, and ſo is
iginal declaration of the uſes of this fine. So the next
ıe conſidered is, whether the writing of the thirty-firſt of
is ſufficient to declare the uſe of the fine; or if it be not
, whether it will controul the deed of the twenty-ninth of
—FIRST, I hold it is a ſufficient writing to declare the
ıe fine. Now it is not neceſſary in declaring a uſe, if
a tranſmutation of poſſeſſion, to uſe the very word *uſe*.
eſſion, whereby the mind of the party may be known that
ne ſhall have the land, is ſufficient. We all know the
a uſe, that it was a mere equitable intereſt; the eſtate
as in one, and the benefit and advantage of the eſtate in

Uſes are indeed ſtrange things in their nature, and of
ntion in the law. The original of them was to avoid
ɛ of Mortmain, *Brent's Caſe (a)*; for when thoſe ſtatutes
d the conveying eſtates to the clergy, they found out this
ıve the eſtate conveyed to lay perſons, under ſecret truſts,
ſe, which in thoſe days affected the conſcience of the
and until the time of *Henry the Eighth* clergymen ſat in
; who, having power over men's conſciences, inforced
ɔerform thoſe uſes. Indeed for a time uſes were kept
d did not much appear until the differences between the
f *York* and *Lancaſter*; wherein the whole nation being

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conſtruction, and it amounted to a bargain and ſale, and ſo is *Fox's Caſe* (*a*). Now in this caſe here is an agreement between the huſband and wife, which though void as to an agreement, yet is good to declare a uſe. As ſuppoſe a man at this day make a bargain and ſale, and the deed is not inrolled, or make a charter of feoffment, and there is no livery, yet they will be ſufficient to declare the uſe of a fine afterwards levied between the ſame parties. But ſuppoſe this be not a ſufficient declaration of the uſe of a fine, yet it will be ſufficient to controul the deed of the twenty-ninth of *January*; for thereby it is expreſsly declared, that all writings, agreements and aſſurances, and deeds whatſoever, different from the agreement in the marriage, ſhall be revoked and annulled: ſo that taking it in this ſenſe, to controul and hinder the riſing of a uſe according to the deed of the twenty-ninth of *January*, no uſe can riſe to the huſband; but the eſtate being the wife's, the uſe muſt, by operation of law, be to the wife and her heirs; and if ſo, then the leſſor of the plaintiff has a good title.

Judgment was given for the plaintiff; and affirmed in the houſe of lords.

(*a*) 8. Co. 94. a.

Caſe 289.

Broadwaite *againſt* Blackerby and Perkins.

Bill cannot be filed againſt an attorney in Vacation.

S. C. 1. Salk. 544.

MOVED by NORTHEY, that the defendants might not be obliged to plead, becauſe one of them was an attorney, and the bill was filed againſt him in the Vacation, whereas it ſhould be in Term time, for you muſt declare againſt him as preſent in court.

To which THE COURT agreed.

MR. ASHTON and SIR SAMUEL ASHTREE certified the practice to be ſo, and that it was never uſed to file a bill in Vacation for to be a bill of a ſubſequent Term, the bill muſt be filed *ſedente Curiâ*, the laſt day of the Term; for it is too late after the Court is up.

HOLT, *Chief Juſtice*. If filed in Vacation it cannot be a bill of a precedent Term, for that is paſt, and the other not come (*a*).

In what caſe an attorney may be declared againſt *in cuſtodiâ*.—Comb. 465.

And then HOLT, *Chief Juſtice*, mentioned another fault, that in this caſe a bill ſhould not have been filed againſt him, but he

(*a*) See Holloway *v.* Croſs, cited 2. Burr. 1052.—But in the caſe of Lane *v.* Wheat, Mich. 23. *Geo.* 3. it was determined, that a bill may be filed againſt an attorney in Vacation, to prevent the ſtatute of Limitations from attaching, Doug. 213. And Mr. Juſtice BULLER ſays, the doctrine "that a bill filed in "Vacation cannot be referred either to "the precedent or ſubſequent Term" cannot be ſupported; for if that were true, no proceedings could go on out of Term: And it ſeems now decided, that a bill may be filed againſt an attorney in the Vacation in all caſes, Waghorn *v.* Field, 5. Term Rep. 173, 174.

ſhould

ould have been declared againſt as *in cuſtodiâ*; for when you roceed jointly againſt a privileged perſon and one not privileged, ou muſt declare againſt them all *in cuſtodiâ*, for in a joint action he privilege * is loſt; as in the common pleas, if you have an ction there againſt an attorney and another, you muſt take out an riginal againſt both:

BROADWAITE *againſt* BLACKERBY AND PERKINS.

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And SIR SAMUEL ASHTREE certified, that it was never done, nor could be done, to declare againſt one in cuſtody and the other preſent.

So THE COURT gave them leave to ſtrike out what they would; ſo they did not add anything, and ſaid, that if the bill be irregularly filed, it may be taken off of the file.

Et adjournatur.

Anonymous. Caſe 290.

UPON A MOTION for an attachment for not returning a *mandamus*;

Attachment in chancery on an *alias* and *pluries* is returnable in *B. R.* and is an action on which damages ſhall be recovered.

It was ſaid by HOLT, *Chief Juſtice*, that an attachment in chancery on an *alias* and *pluries* is returnable in this court; and is not merely for the contempt, but is really an action, whereon the plaintiff ſhall recover damages for the delay in not executing the writ; and we have without reaſon gone on in imitation of chancery. It is a contempt not to return the firſt *mandamus*. Therefore let a return be made within a week (*a*).

(*a*) See poſtea, Eaſter Term, 12. *Will.* 3. the caſe of Cecil and Others of the Town of Nottingham.

Courtney *againſt* Collet. Caſe 291.

TRESPASS FOR BREAKING HIS CLOSE, treading down the graſs and laying nets on the ſoil, and for carrying away his fiſh; *nec non de eo quòd* the defendant *vi et armis* did break down certain wares, whereby the water over-flowed the piſcary of the plaintiff adjoining, *per quod* the fiſh eſcaped out of the piſcary, and the plaintiff and his ſervants were hindered from fiſhing there. Verdict for the plaintiff.

Treſpaſs and caſe cannot be joined. S.C. Carth. 436. S. C. 1. Ld. Ray. 272. Stra. 635. Black. 898.

IT WAS MOVED *in arreſt of judgment*, that here treſpaſs and caſe were joined together, which could not be: FIRST, Becauſe no actions can be joined, either when they are different in their nature; or SECONDLY, When they require different anſwers; or THIRDLY, if they require different judgments (*a*), as treſpaſs and caſe do: for in one judgment is *capiatur*, and in the other, *quòd ſit in miſericordiâ*.

Ante p. 73.

BUT IT WAS URGED *on the other ſide*, that it was all treſpaſs, and that the *per quod* was only in aggravation of damages.

And this Term THE COURT was of opinion that it was all treſpaſs; and judgment was given for the plaintiff.

(*a*) See Dalſton v. Janſon, 1. Ld. Ray. 58. and 3. Wilſ. 318. 1. Term Rep. 277.

Hinton

Caſe 292.

* Hinton *againſt* Hern.

Franchiſes not to be allowed on motion, until they have been pleaded, and are upon record.

S. C. 2. Salk. 450. 672. Skin. 12. 1. Salk. 343. 2. Wilſ. 406. Gilb. C. B. 195.

MOUNTAGUE moved in behalf of THE UNIVERSITY OF CAMBRIDGE, that they might be allowed their privilege in relation to *licenſing of taverns* in *Cambridge*, upon producing their charter.

But it was denied, and ſaid by HOLT, *Chief Juſtice*, that when a privilege is once aſcertained, and it appears upon a record, then it ſhall afterwards be allowed upon motion; but where it was never conteſted before, there it muſt be judicially determined; and ſo it was done in the caſe of *Caſtle v. Litchfield (a)*, in the exchequer.

(a) Hard. 505.

Caſe 293.

The King *againſt* Sancky and Tipper.

Where ſtatute gives a remedy for what was before ſuable in the ſpiritual court, unleſs the ſtatute alters the offence or puniſhment, the juriſdiction is not taken away.

S. C. Holt, 657. S. C. 1. Ld. Ray. 323.

THE DEFENDANTS being quakers were committed to *Worceſter* gaol, for refuſing to anſwer on their ſolemn affirmation in a cauſe of ſubſtraction of tithes, or other eccleſiaſtical duties:

And it was moved they might be diſcharged, becauſe in the ſtatute 7. & 8. *Will* 3. c. 34. ſ. 4. for permitting quakers ſolemn affirmation, there is a clauſe appointing a ſpeedy remedy againſt quakers for tithes, *viz.* by complaint to a juſtice of peace, which takes away the ſpiritual juriſdiction; for where the common or ſtatute law gives remedy *in foro ſeculari*, whether the matter be temporal or ſpiritual, the conuſance of that cauſe belongs to the king's temporal courts, unleſs the juriſdiction of the ſpiritual court be ſaved or allowed by the ſame ſtatute. *Co. Lit.* 96. *b.* *Jo.* 320.

But by HOLT, *Chief Juſtice*, The remedy appointed by the law for tithes againſt quakers ſeems only an additional remedy. The eccleſiaſtical and temporal courts have herein a concurrent juriſdiction; as in the caſe of a penſion payable out of a parſonage by preſcription, notwithſtanding the opinion of my LORD COKE on the ſtatute of *Circumſpecte Agatis*, you may ſue in the ſpiritual court for the ſame, though a writ of annuity lies alſo at common law. But where the ſtatute alters the offence, and makes it of a higher degree, there it takes away the eccleſiaſtical juriſdiction; as in caſe of *polygamy*, after a man has been tried for the ſame: ſo in caſe of a baſtard-child, where a man has been adjudged the reputed father of it, they cannot proceed for ſlander on that account.

A commitment in the *diſjunctive* is bad.

Then ANOTHER EXCEPTION was taken, that they were committed for not paying tithes, * or other eccleſiaſtical duties, in the diſjunctive, without ſhewing certainly for what the ſuit was; for * [166] though the words of the ſtatute are in the diſjunctive, yet in the commitment it ſhould be preciſely ſhewn.

And for this exception the defendants were diſcharged.

The

The King *againſt* Williams and Others.

Caſe 294.

:TMENT for reſcuing *Borlace* out of the ſheriff's cuſ- in the *Inner Temple*; which ſets forth, that a *latitat* iſſued ainſt *Borlace*, *Termino Sanctæ Terinitatis*, whereon he was , and they reſcued him; and the indictment was quaſhed, it does not appear that any legal *latitat* iſſued out, there o ſuch Term as *Sanctæ Terinitatis*.

On an indictment for a reſcue a writ muſt be ſhewn.

Brewſter *againſt* Kidgill.

Caſe 295.

:, upon a wager concerning a rent-charge of forty pounds 'ear, whereof the plaintiff, as ſon and heir of *Ellen Brew-* ſeiſed in fee by virtue of a grant to her and her heirs, iſ- ut of a manor, of which *Kidgel* is terretenant; that the de- affirmed, it was lawful for him to deduct four ſhillings in nd for parliamentary taxes, which the plaintiff denied, &c. on iſſue joined, a ſpecial verdict was found, that on the -ſixth of *November* 1649, *Robert Langford* was ſeiſed in fee ıanor of *B.* and that in conſideration of eight hundred pounds *Ellen Brewſter*, he granted to her and her heirs a rent- in fee of forty pounds *per annum*, with a covenant in the r further aſſurance; and on the back of the deed this in- ent was, "MEMORANDUM, It is the true intent and ing of theſe preſents, that the grantee and her heirs ſhall for hereafter be paid the ſaid rent-charge, without any deduc- or abatement of taxes, charge, or payment out of, for or erning the ſaid rent, or the ſaid manor or lands charged with." And afterwards in 1652, for further aſſurance, and confirmed the rent aforeſaid to *Ellen Brewſter*, and rs, with a *nomine pœnæ*; and *Robert Longford* covenants, the ſealing thereof he was ſeiſed in fee, and that it was free l incumbrances, and that he had power to charge the ſame; t the ſaid yearly rent of forty pounds *per annum*, freed from s, ſhall be for ever hereafter duly paid * at the time and or the payment thereof, &c.

A covenant in 1649, that *A.* his heirs and aſſigns ſhall be paid a rent-charge, *free from all taxes*, extends to all future parliamentary taxes.

S. C. Salk. 198. 615.
S. C. 5. Mod. 368.
S. C. Comb. 424. 466.
S. C. Carth. 438.
S. C. 3. Salk. 240.
S. C. Holt, 175. 609.
5. Co. 16.
Hard. 87.
2. Brownl. 281.
4. Co. 80.
Carth. 135.
Ld. Ray. 317.
1. Bac. Abr. 540.

* [167]

queſtion was, Whether the grantor of the rent, and his hall be obliged to pay the ſaid rent, without any deduction by reaſon of any tax impoſed by parliament futurely on the at?

.T, *Chief Juſtice*, delivered the opinion of the Court, that the int doth oblige the grantor and his heirs without deduction. aſe is of very great conſequence, and has been a queſtion a me, whether ſuch covenants extend to all future parlia- y taxes whatſoever; which I think would be very hard, and I no means agree thereto in this large ſenſe; but as the na- f this caſe is, WE ARE ALL OF OPINION, that it extends to

all

BREWSTER *againſt* KIDGILL.

all thoſe ſorts of taxes that ſhall be given by future acts of parliament (*a*).

FIRST, When "taxes" are generally ſpoken of, if the ſubject matter will bear it, they ſhall be intended parliamentary taxes given to the Crown. There are divers other things improperly called taxes, as rates for church and poor, ſewers; ſo any impoſition that leſſens a man's property is called a tax; ſo in the ſtatute *De Tallagio non concedendo*: But when taxes are generally ſpoken of, they are to be underſtood of the higheſt and moſt eminent ſort of taxes, thoſe in aid of the Crown.

SECONDLY, That which particularly affects this caſe is, the time when this covenant was made, *viz.* in the year 1649, when taxes of this nature had been uſed for four or five years before. The way of aſſeſſment began ſince the war in 1642, and in all thoſe acts, or ordinances, there is this very clauſe that is now in the acts, on which this queſtion ariſes: If this covenant had been in the year 1640, it would not have reached this caſe, becauſe there was no ſuch kind of taxes in being. There have been ſeveral ways of taxing; the antient way was by tenths and fifteenths; ſecondly, by ſubſidies, properly ſo called; thirdly, by aſſeſſments or royal aids, which are the ſame; and laſtly, by this way of the pound-rate. The tenth and fifteenth is the moſt antient way of tax (*b*). The fifteenth was originally ſet upon every man's head, but ſince the eighth year of *Edward the Third* that was altered for then, by commiſſions into every county in *England*, a valuation was made of all cities and towns at that time, and returned into the exchequer: after which, when a fifteenth was granted, every town knew its proportion, it appearing on the roll of the exchequer what they were to pay; and then each town rated * its own inhabitants to make up the tax; which tax was antiently levied on their goods, and not on their lands; this being a tax on the perſon and not on the land, as appears from the *Caſe of the Abbot of Glaſtonbury*, 11. *Hen.* 4. 35, 36. But this levying on the goods being found troubleſome, they afterwards in moſt places agreed to levy it *ſecundum ratam terrarum ſuarum*, by valuation of every particular acre. Now while this tax continued, this covenant could have had no manner of effect, becauſe no rent was chargeable with this tax, for the occupier and poſſeſſor of the land was to pay his ſhare according to the valuation of the land; and the rent was not at all concerned, but the occupier was to pay, though he held the land at a racked rent. After this the ſubſidy-tax came in. The firſt I find was 32. *Hen.* 8. which was thus: If a man was taxed for lands and goods, he was not to pay a tax for both, but for that only which was of the higheſt value; ſo that this was no tax on

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(*a*) But ſee the following caſes, Blandford *v.* Marlborough, 2. Atk. 558. Bradbury *v.* Wright, Dougl. 624. Williams *v.* Pritchard, 4. Term Rep. 2. Eddington *v.* Norman, 4. Term Rep 4.

(*b*) Spelman Gloſſary, verbo "Quinta decima," and the laſt chapter of MAGNA CHARTA, 2. Inſt. 76, 77.

the

ourſe to them again, calling them royal aids. But ever
inning of theſe aſſeſſments there was always a clauſe, that
the land might deduct the tax out of the rent; and
s plain the deſign of the parties here was to make pro-
t any ſuch deduction for the future. This way of taxing
come frequent, though they were impoſed by an uſurped
t thoſe being the powers at that time, and people forced
therefore endeavoured to ſecure themſelves againſt
tracts. There was ſuch a tax in being as the ordi-
ptember 1649, when this covenant was made.

r, Though in truth taxes cannot be granted but by
yet they are not of a foreign nature, but are known
and have always a virtual, though not an actual ex-
hey are abſolutely neceſſary on emergent occaſions;
ie conſtitution of the government, in ſuch caſes the
be ſupplied by thoſe extraordinary aids; which is the
he king may *grant an exemption from all future * [169]
y taxes. 19. *Hen.* 6. 62. 1. *Edw.* 3. *ſtat.* 2. *c.* 6.
nd therefore this covenant does not provide againſt an
dent, but againſt a thing well known in our law, as
r conſtitution.

CT REASON why this covenant ſhould extend to future
auſe it is granted "to *E. Brewſter* and her heirs;" which
no effect if not ſo underſtood. It appears indeed by
i made in the late acts, that it was thought that theſe
would have been repealed, except there had been a
uſe it enacts, that the tenant ſhould deduct. This
as indeed cautious and wiſe, for preventing diſputes,
lutely neceſſary.

Because theſe taxes newly impoſed are the ſubject mat-
covenant to work upon.

BREWSTER *against* KIDGILL.

of the covenant; but where a man obliges himſelf to do a thing, which perhaps was not lawful before, and an act makes it lawful, that act does not repeal the covenant (*a*). A leaſe for years was made to a clergyman before the 21. *Hen.* 8.; he covenanted not to alien without licence; after which the 21. *Hen.* 8. was made, which prohibited any clergyman to hold any land in farm; whereupon the clergyman aſſigned without licence, and the covenant was held not to be broken; becauſe the 21. *Hen.* 8. made it unlawful for him to hold it (*b*). A tenant in tail was bound in a recognizance not to alien, after which 32. *Hen.* 8. enabled a tenant in tail to make leaſes for twenty-one years, or three lives; he made a leaſe for three lives, and his recognizance was held to be forfeited notwithſtanding the ſtatute; becauſe the act giving him only an ability to do it, the condition was not thereby diſpenſed with: So in this caſe, it does not oblige the tenant to deduct, if only makes it lawful for him ſo to do.

THIRDLY, This act was made in this manner only for the better collecting and anſwering this tax to the Crown. Now when an act is made to a particular purpoſe, it ſhall not have any collateral effect to any purpoſe whatſoever. 19. *Hen.* 6. 62. *Henry the Fourth* granted to the rector of *Eddington* an exemption from all future parliamentary taxes to the crown, and a ſubſequent tax was afterwards given to the king, without any ſaving therein of ſuch charters of exemption, and held that ſubſequent act does not deſtroy the grant.

*[170]

Vide 1. Sid. 7.

But there are two objections to be anſwered.

THE FIRST OBJECTION is, that general words ſhall not be conſtrued to extend to any act to be provided for by ſubſequent act of parliament, according to the *Archbiſhop of Canterbury's Caſe*, 2. Co. 46. To which I anſwer, FIRST, That the rule taken in that caſe has ſeveral exceptions. SECONDLY, That where ſuch general covenant may ſecure againſt ſuch incumbrances, as may be impoſed without act of parliament, it may be hard to extend it to parliamentary charges. But in this caſe the covenant could extend to no other charges, becauſe the tenant had no power, by any law then in being, to pay any tax for the grantee out of the rent due to him.

THE SECOND OBJECTION is, that though this covenant ſhould be good as to the monthly aſſeſſments, yet not to this pound-rate, which was not in being when this covenant was made. To which I anſwer, that theſe two ſorts of taxes differ only in form; the nature of the tax is the ſame; the ſame things are taxed; and the ſame clauſes of deduction are in both. To conclude this matter, this was a tax in being at the time of making this covenant, which ſhews plainly that the meaning of the parties was to provide againſt it. If indeed an act of parliament had given ſo much money towards the building of *St. Paul's*, that would not have been

(*a*) Dyer, 27. But ſee 3. Mod. 30. 2. Fq. Caſes Abr. 26. 3. Brown P. C. 401.

(*b*) Dyer, 48. pl. 5.

within

within this covenant; for it extends to taxes to the crown only, which are uſual taxes, and then given when this covenant was made. BREWSTER *againſt* KIDGILL.

There is another matter in which I have not conſulted my Brothers, and that is, whether the terretenant in this caſe is obliged by the covenant: this is a covenant by the grantor of the rent, who was ſeiſed in fee of the manor. Now who this terretenant is does not appear, whether he be heir or aſſignee; for if he be aſſignee, I do not think him chargeable in law; for this covenant does not run with the land. *Hard.* 87. I make no doubt, but that the aſſignee of the rent ſhall have covenant againſt the grantor, becauſe it is a covenant annexed to the thing granted; but that covenant ſhould run with the rent againſt the aſſignee of the land, I ſee no reaſon. If this rent was granted ſo to be paid, it would be another matter; but * here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this caſe againſt the terretenant, but in equity; and therefore for this point I do not ſee how the plaintiff can have his judgment; for if this covenant ſhould charge the land, it would be higher than a *warrantia chartæ*, which only affects the land from the judgment therein given. * [171]

But THE OTHER THREE JUDGES thought that this covenant might charge the land, being in nature of a grant, or at leaſt a declaration going along with the grant, ſhewing in what manner the thing granted ſhould be taken, and reckoned the indorſement as part of the deed.

And ſo judgment was given for the plaintiff.

Sherington *againſt* Andrews. Caſe 296.

A SEISED of a rectory of one hundred and twenty pounds *per annum*, charged with a fee-farm rent of twenty-ſix pounds *per annum*, was taxed for all the rectory only according to the rate of twenty-five pounds *per annum* for taxes; he retains four ſhillings *per* pound for the fee-farm rent, which was much more than he really paid: the whole matter appearing in the exchequer, where a bill was brought, it was decreed, that the owner of the fee-farm rent ſhould allow only in proportion to what was paid. S. C. Comb. 481.

Pickering's Caſe. Caſe 297.

PICKERING ſeiſed of land, and *Sir J. Werden* of a fee-farm iſſuing out of it, paid taxes only after the rate of one ſhilling and three pence *per* pound, and retained for the fee-farm after the rate of four ſhillings, at which the land-tax was; on which *Sir John Werden*, owner of the fee-farm rent, brought his bill in the exchequer, and prayed that *Pickering* ſhould ſet forth the value of the land, and what rent he received, and what he had paid for

PICKERING'S CASE.

taxes; to which bill *Pickering* demurred, and the demurrer allowed, notwithſtanding the above *Caſe of Sherington* was cited; the whole matter there appearing, and this being on a demurrer, which was made the difference.

Caſe 298. Burdeaux *againſt* Dr. Lancaſter, Vicar of St. Martin's, and Richard Greſdale, Pariſh Clerk there.

No fees due for chriſtening or burial, unleſs by cuſtom.

DR. LANCASTER and *Greſdale* ſued *Burdeaux* in the conſiſtory court of the biſhop of *London*, alledging therein that *Dr. Lancaſter* was vicar, and *Richard Greſdale* clerk of *St. Martin's*, and that *ratione præmiſſorum ac etiam* of an immemorial cuſtom, * the vicar was intitled to two ſhillings and ſixpence for every child born and baptized within the pariſh, and twelve pence for the churching every woman; and the clerk was intitled to twelve pence for the regiſtering every child; and that *Burdeaux* was an inhabitant within the pariſh, and had a daughter born therein, and had not paid.

*[172]

S. C. Salk. 332. S. C. Holt, 317. Hob. 175.

Burdeaux denied the cuſtom in the ſpiritual court, and moved here for a prohibition, ſuggeſting, that a clerk is a lay officer, and his fees lay, for which he can only ſue in the temporal court; that of common right no fees are due for ſacraments; that there was no ſuch cuſtom as was alledged; that all cuſtoms are triable by the common law; and that this child was not baptized, nor his wife churched by the vicar; nor his child regiſtered by the clerk.

AND NOW IT WAS URGED *againſt this prohibition*, that theſe were fees uſed for eccleſiaſtical matters, and therefore might be ſued for in the ſpiritual court; and the rather, becauſe they were ſmall inconſiderable matters, juſt like private ſeamen's wages; and that the doctor and clerk did not ſue for them as due by cuſtom, but of right by canon law.

HOLT, *Chief Juſtice*. Nothing can be due for theſe matters by common right; and as for the canon law, it is of no authority of itſelf in *England*, but only ſo much as has been through cuſtom received here. The Convocation cannot by their canons take money out of people's pockets. *Lindwood* ſays, if a parſon takes anything for chriſtening, it is ſimony; but indeed, ſays he, ſomething may be by cuſtom; but then this cuſtom can never be good, to take money for chriſtening a child which never was chriſtened by them. This is like the caſe in *Hob.* 175. where a man died in one pariſh and was buried in another, and a fee was demanded for his burial in the pariſh where he died. If you ſay you ought to chriſten their children, you ought to libel againſt them for not chriſtening their children, according to the canon law, but you can never have money for chriſtening when you do not.

Therefore let a prohibition go; and if you think fit, they ſhall declare, and you may do thereon as you pleaſe.

Trantor

Trantor *againſt* Duggan.

Caſe 299.

DUGGAN claimed an eſtate within the grand ſeſſions of *Wales*, under a deed of ſettlement, which deed he pretended *Trantor* got, and preferred a bill in equity for the diſcovery thereof, in equity-ſide of the grand * ſeſſions, againſt *Trantor* who lived *London*, and ſerved him with a *ſubpœna* thereon:

The grand ſeſſions of *Wales* cannot ſequeſter the eſtate of a perſon who reſides out of its juriſdiction.

S. C. ante, 138. S. C. Comb. 468.

Trantor moved for a prohibition, ſuggeſting, that no man ght to be troubled by virtue of any proceſs there, except he within the juriſdiction of the court; and that he lived in *ndon*, and was ſerved with a *ſubpœna* there.

And a prohibition was granted PER CURIAM, ſaying, they uld not prohibit their proceedings in this court of equity, but y their proceeding on any proceſs againſt any living out of ir juriſdiction; for elſe, if he did not appear there, they would ueſter the eſtate he had within their juriſdiction.

Then it was moved, that *Trantor* might have pleaded this below the juriſdiction of the Court.

But THE COURT ſaid, if he had lived within the locality of ir juriſdiction, though in a franchiſe, or place exempt, it might re been another matter; but where a man lives out of the iits of their juriſdiction, it is no reaſon to force him to appear re to defend himſelf. Wherefore, &c.

BIBLIOTECA DOMINICANA

Thomſon *againſt* Leach.

Caſe 300.

EJECTMENT.—On a ſpecial verdict, the caſe was: *S. Leach* tenant for life, with contingent remainders in tail; remainder r to *Sir Simon Leach* in tail; remainder in fee to *N. Leach*. e tenant for life, before the contingency happened, ſurrendered *Sir Simon Leach*, but at the time of the ſurrender was *non pos mentis*.

Surrender by a lunatic is abſolutely void.

S. C. Carth. 211. 250. 435. S. C. Comb. 438. 468. S. C. Comy. 45. S. C. 1. Eq. Abr. 278. S. C. Holt, 357. 623. 665. S. C. 3. Lev. 284. S. C. 3. Mod. 296. 301. S. C. 1. Ld. Ray. 313. S. C. 2. Salk. S. C. 2. Vent.

THE QUESTION was, Whether this ſurrender by a *non compos* s void? and if not void, but only voidable, Whether there be h a right ſtill remaining in the *non compos*, as is ſufficient to port the contingent remainder?

And PER CURIAM, The ſurrender is void; for whatſoever is ie by an infant, or *non compos mentis*, which takes effect only deed, is void (*a*); but it is otherwiſe in caſe of a feoffment, by ſon of the notoriety and ſolemnity thereof.

. 618. 675. S. C. 3. Salk. 300. S. C. 1. Show. 296. S. C. Show. P. C. 150. . 3. Bac. Abr. 87, 88. 138. 4. Bac. Abr. 315.

(*a*) See Hudſon *v.* Jones, 3. Bac. 1794. Saunderſon *v.* Marr, 1. H. Bl. 139. Abbott *v.* Parſons, 3. Burr. Rep. 75.

THOMSON *against* LEACH.

8. Co. 45.
8. Co. 42. b.

And *per* HOLT, *Chief Juſtice*, If *non compos* make a feoffment by letter of attorney, he is as much diſabled to avoid that feoffment himſelf as if he had made livery in perſon; and yet it is a void feoffment to all other perſons. The true reaſon why a feoffment by an infant, or *non compos*, is but voidable, is becauſe of the notoriety and ſolemnity of the feoffment and livery, that antient way of conveying, which is in view of the whole country, who ſaw the tranſmutation of poſſeſſion; and therefore it was preferred before all ſecret ways; and therefore if tenant in tail make a * feoffment, it deveſts the remainder and turns all to a right. But if tenant in tail make a bargain and ſale, or a leaſe and releaſe in fee, he makes no deveſting thereby, but only paſſes an eſtate for his life. The caſe of *Loyd v. Gregory (a)* is expreſs, that the ſurrender of an infant is void. If an infant grant a rent-charge, and the grantee diſtrains, the infant may have treſpaſs, which ſhews the grant to be void; and where it is ſaid in the Books, *Whelpdale's Caſe (b)*, that the grant of an infant is not void, but only voidable, the meaning thereof is, that he cannot plead *non eſt factum*, and give infancy in evidence, becauſe it has all the formalities of a deed, as writing, ſealing, and delivery; but he ſhall ſhew the ſpecial matter whereby it may appear, that as to the operation of the deed, or efficacy of it, it is void. An infant and *non compos*, are parallel in all caſes, but only as to the *non compos's* diſabling himſelf; but the heir may enter on the alienee of the ideot without *ſcire facias*, but not during the life of an ideot or *non compos*. There has been another queſtion ſtarted worthy of conſideration, *viz.* Suppoſing the *non compos* had made a feoffment in fee, yet whether is not a right remaining in him ſufficient to ſupport a contingent remainder, though a right of action will not? for the reaſon why he cannot avoid his feoffment is not for want of right, but becauſe of his perſonal diſability: and if tenant for life make a feoffment during his lunacy, the king, upon office found that he is a lunatic, may avoid the feoffment by *ſcire facias*, and ſo reveſt the inheritance; and if ſo, why may he not alſo prefer a contingent remainder? A right of entry will, though a right of action will not ſupport a contingent remainder: as if there be tenant for life, with a contingent remainder over, and tenant for life be diſſeiſed, the whole eſtate is deveſted, but the right of entry in the tenant for life ſhall ſupport the contingent remainder: but if tenant for life be diſſeiſed, and a contingent remainder, expectant upon his eſtate, does not veſt before a deſcent is caſt, then it is gone, becauſe it is turned into a right of action; though now it may be preſerved longer by the ſtatute of *Hen.* 8. c. . whereby, except a diſſeiſor be five years in poſſeſſion, a deſcent will not take away his entry. The caſe of *Bigot v. Smith (c)* is a remarkable caſe; which was, Baron and feme jointenants for life, remainder to the heirs of the ſurvivor of them; the huſband alone made feoffment

*[174]

Vide 3. Co. The Caſe of Fines, 10. Co. Seymour's Caſe.

(a) 1. Cro 502.
(b) 5. Co. 119. 10. Co. 43. Salk. 675.
(c) 1. Cro. 102.

in

d died, the wife ſurvived; and the queſtion was, * Whe- THOMSON *againſt* LEACH.
contingent remainder could ariſe out of the wife's eſtate? that it ſhould not; becauſe, that during the coverture ſhe ght of entry or action, but the huſband had the power of e eſtate; and though her eſtate and the contingency hap- d ſtarted up together *eo inſtante*, yet this was not ſuffi- cauſe the particular eſtate that ſhould ſupport the contin- ght to be precedent. But there is no neceſſity to heſitate int, becauſe on THE FIRST POINT it is plain that judg- ght to be for the plaintiff.

Britton *againſt* Cole. Caſe 301.

PASS for taking forty-three ſheep and two lambs, the ntieth of *May*, in the ſeventh year of *William the Third*. lefendant juſtifies, that the twelfth of *February*, in the r of *William the Third*, before the treſpaſs alledged, the rit of *levari facias* iſſued out of THE EXCHEQUER to the *Glouceſter*, reciting, that the late ſheriff of *Glouceſter*, : of a *capias utlagatum* iſſuing out of the common pleas *Francis Creſſet*, who was outlawed in *Somerſetſhire* on the lay of *June*, in the fifth year of *William and Mary*, at of *Thomas Cole*, *modo defendentis*, and *Mary* his wife, in debt, had returned, that the ſaid *F. Creſſet* was then ſeiſed the lands in queſtion; and that he ſeiſed the lands into the nds, which were found to be of the annual value of fifty- ds, and therefore the king commands the ſheriff that all lar the rents, iſſues and profits of the premiſes ariſing from the taking the ſame into the king's hands, to the *the Annunciation* then next enſuing, ſhould be levied ac- to the annual value thereof, ſo that the money thereof ould be had before the Barons of the Exchequer at ſuch by virtue of which writ the ſheriff made a precept direct- his bailiffs, and particularly to *Anth. Powell*, *J. O.* and *ll*, to levy the money aforeſaid, according to the tenor of writ, out of the iſſues of the ſaid land; and becauſe the y-three ſheep and two lambs were, after the ſaid inqui- id before the Feaſt of *the Annunciation*, *levant et couchant* art of the premiſes, the defendant requeſted the ſaid *ll* and *J. Powell* to take and drive away the ſaid ſheep s, according to the tenor of the ſaid writ; *ſuper quo idem P.* and *J. Powell* took and drove away the ſaid ſheep s.

The cattle of a ſtranger, *levant et couchant*, on land extended on an outlawry, may be taken by *levari facias*, for they are the iſſues.

S. C. 5. Mod. 112. S. C. Salk. 395. 408. S. C. Comb. 434. 469. S.C. Carth. 441. S. C. Skin. 617. S. C. Holt, 421. S. C. Comy. 51. S. C. 1. Ld. Ray. 305. 8. Mod. 358. 3. Bac. Abr. 757. 4. Bac. Abr. 460.

hich plea the plaintiff demurred, and the * defendant joined rer. * [176]

OLT, *Chief Juſtice*, delivered the opinion of the Court.— : in ſhort is: *Creſſet* is outlawed in a perſonal action; ſpecial *capias utlagat.* and inquiſition thereon, ſuch lands

Britton against Cole.

are found to be his, and returned to be of the annual value of fifty-five pounds; the plaintiff's cattle are found upon the ſame land *levant et couchant*; they are taken by virtue of a *levari facias*; and the queſtion is, Whether this taking be juſtifiable? and we are of opinion it is.

First, Becauſe there is a direct command to the ſheriff to levy this duty, according to the annual value, out of the iſſues of the land; and cattle *levant et couchant* on the land are iſſues, The ſtatute of *Will.* 2. c. 39. ſays, that *omnia bona mobilia* on the land are iſſues; and *omnia mobilia* comprehend cattle. 2. *Inſt.* 453.

Secondly, The land is debtor to the king, which makes the cattle liable; and if the king had not this remedy, his pernancy of the profits would ſignify nothing, for it would be in the power of the party outlawed to defeat the king; he will let out the ground or take in cattle on contract to feed, and ſo run away with the whole profits, and there is no remedy for the king to get the money on the agreement. Now if the perſon outlawed, during his outlawry, make a feoffment in fee, ſhall not the cattle of the feoffee be iſſues of the land? Without queſtion they ſhall; for the feoffee ſhall take the land in the ſame plight as the outlawed perſon had it, and the feoffment ſhall not determine the king's right; notwithſtanding the Book of 21. *Hen.* 7. 7. which ſays, the king's intereſt ſhall be determined by the alienation of the outlawed perſon, which Book is to be underſtood with this difference, If a man be outlawed, and before inquiſition taken he aliens his eſtate, and then inquiſition is taken, the alienation of the real eſtate, before inquiſition taken, prevents the king from having the pernancy of the profits; but if he make alienation after the inquiſition taken, there the king's pernancy of profits continues, and this is the conſtant courſe of the exchequer: ſo is the caſe of *The Attorney General v. Freeman (a)*, and *Winſor v. Savill (b)*. The reaſon of which difference is, that until the inquiſition be found the king has nothing; for the inquiſition that is taken on a ſpecial *capias utlagatum* is an office that intitles the king; ſo that if the alienation be before office found, then it is before the king has a title; but after a title is once veſted in the king, that ſhall not be deveſted by any act of the party. "Iſſues and profits" cannot * mean the goods of a perſon outlawed, for he cannot have goods; if after outlawry he purchaſes them, they are the king's without office; but as to the real eſtate, or a chattel real, the king cannot be intitled without office, but for chattels perſonal he may. Since iſſues may be levied on feoffee or alienee that comes in after inquiſition, why not in this caſe? nay, perhaps the plaintiff here may be alienee; it is not neceſſary the king's officer ſhould take notice of his title; he ought to make it appear. Suppoſe this plaintiff had a right to the land precedent to the outlawry; as for inſtance, a

12. *Hen.* 7. 7.

Poſtea Mich. 12. *Will.* 3. Dubois v. Trant.

*[177]

Cro. Jac. 82.

(a) Hardres, 101. (b) Raym. 17.

leaſe

paſſer; for a wrong-doer ſhall not have more advantage
hat has right. The caſe of *Stafford v. Bateman (a)* has
ted, where it was held, that on a *fieri facias* for the king's
goods could be ſold but the debtor's; but that caſe is quite
from this, for that was a *fieri facias de bonis et catallis* of
r, on which the ſheriff had no authority to take a ſtranger's
ut this is a *levari facias de exitibus terræ*; to explain
is to be conſidered there are ſeveral executions for the
rſt, a *capias* to take the body only; ſecondly, a *fieri*
hirdly, an *extendi facias*, which is called the long writ;
hly, this *levari facias de exitibus terræ*; by none of the
t could the plaintiff's cattle be taken. Now as to iſſues, Kelw. 66. a.
y are forfeited, the whole inheritance is charged with
f tenant for life be returned on a jury, and make default,
he forfeits iſſues, and dies, the arrear of the iſſues ſhall be
the remainder. The land is debtor, and becomes debtor
lt of tenant for life only; for which this reaſon is given,
a public ſervice charged on the fee-ſimple, and therefore
muſt be charged with the iſſue, by whomſoever default
ow indeed, how this be in caſe of an outlawry, I doubt;
ant for life be outlawed, and he is found to be but tenant
by inquiſition, and there is an arrear of iſſues, I do not * [178]
ether it can be levied on the reverſion; becauſe it ariſes
tenant for life's own particular neglect and default. But
it makes no alteration to thoſe that claim under tenant for
Sir Henry Clare's Caſe (b), two tenants in common, one
bted to the king, and on proceſs the beaſts of the other
en; and it was held they could not; becauſe the one te-
ommon may put his beaſts on all the lands; and ſo is
Abr. 457.; but ſays the Book, "it will be otherwiſe for
that come in by wrong on the land of the king's debtor,

BRITTON *against* COLE.

et couchant, are as liable as the cattle of the owner; and ſo it is in the caſe of a rent-ſervice. Nay, if one ſeiſed in fee grant a rent-charge, though this be a charge on the land by his own act, yet if his neighbour's cattle eſcape thereinto, and happen to be there *levant et couchant*, they are diſtrainable, becauſe the land is debtor. This caſe was adjudged in point in the exchequer, *Hodgſon v. Toobigle (a)*, which was treſpaſs, as this is; and HALE, *Chief Baron*, ſaid, that by virtue of a *levari facias de exitibus terræ* of a perſon outlawed, the cattle of a ſtranger may be taken, and ſo is the conſtant practice of the exchequer; whereupon the party, ſeeing the opinion of the Court, relinquiſhed his ſuit, ſo that no judgment is entered: and there is another caſe in point in the exchequer, *Wrightſon v. Rayner (b)*. So that we think the defendant's plea good in ſubſtance, and that the cattle were liable to be taken and ſold by virtue of the *levari facias*.

There have been ſeveral exceptions taken to the pleading.

In a juſtification by a ſtranger under a writ of *levari facias* againſt an outlaw, a judgment to warrant the writ muſt be ſtated in the plea.

FIRST EXCEPTION, That the defendant, not being an officer, ought to have pleaded the record of the outlawry; which ſeems to be a good exception, but ſomething complicated, which I will explain: If there be no judgment, and a *capias ad ſatisfaciendum* or other execution be taken out, the ſheriff, and all other perſons acting under * him in the execution, are juſtifiable, though there be no judgment. But if a ſtranger of his own head interpoſe, who is not concerned, and he ſets on the ſheriff to do execution, he cannot juſtify this: or ſuppoſe it be the plaintiff who ſued out the writ, he muſt in his juſtification plead the judgment; for if there be no judgment he is a treſpaſſer, *Turner v. Felgate (c)*. Now if the defendant had juſtified that he did it by command, or in aid of the officer, then he had been in the ſame caſe with the officer himſelf; but if he will come in without any authority, though he be a party concerned in the ſuit, yet he ought to ſhew ſome foundation: ſo in outlawry, as well as in the other caſe, he ought to ſhew there was ſome judgment to warrant the *capias ad ſatisfaciendum* or *fieri facias*. In treſpaſs, the defendant juſtified diſtraining the cattle *damage feaſant* as bailiff to *A.*; in which caſe, though the cattle were *damage feaſant*, yet if *A.* did not command the defendant, he was a treſpaſſer; and in this caſe the command was traverſable. 2. *Lev.* 196. 1. *Roll. Rep.* 46. So in replevin, the defendant makes conuſance as bailiff to *A.* that he took the cattle *damage feaſant* by the command of *A.*; the command is traverſable, becauſe damages are only concerned, *Fuller v. Trimwell (d)*. But in replevin of diſtreſs for rent, the command is not traverſable, becauſe it is to try a right, *Buller's Caſe (e)*. By all which it appears, that though the king's writ ſhall juſtify an officer, yet it ſhall not others, except they juſtify under an officer, or there be a judgment to warrant the writ, which muſt be ſhewn by him in his juſtification; and

* [179]

(a) Eaſter Term, 18. *Car.* 2. Roll 14.
(b) Michaelmas Term, 22. *Car.* 2.
(c) Ray. 73.
(d) 2. Leon. 215.
(e) 1. Leon. 50.

therefore

he ſhould have ſhewn the outlawry to be in being *prout record. in C. B.* for which omiſſion the plea is ill.

Britton *againſt* Cole.

HER EXCEPTION that has been taken to the plea is, that aid that the writ was delivered to the ſheriff, or the war- bailiff. Now this is no good exception; for though the to ſay ſo, yet this is a plea in bar, wherein certainty to a ntent is ſufficient; and if they took any of the goods before ame to the ſheriff, or the warrant to the bailiff, it muſt be the replication. *Green v. Jones* (*a*).

A plea in juſtification is good, although it do not ſtate that the warrant was delivered to the ſheriff.

HIRD EXCEPTION to the plea was, that the defendant did *nthony* and *Joſeph* to do execution, and that *John* and l it, which is not purſuant to the requeſt: and though, to *Laſbrook's Caſe* (*b*), execution may be done by one, warrant be to four, yet here, as the defendant has pleaded, by *John* is as much a treſpaſs as the taking by *Joſeph*; * to the merits of the cauſe, we are all of opinion for the ;

A plea ſtating a warrant to *Anthony* and *Joſeph*, and that it was executed by *John* and *Joſeph*, is bad.

* [180]

1. Saund. 18. Co. Ent. 42. 106. 667.

the inſufficiency in pleading, judgment muſt be for the

(*a*) 1. Saund. 298. (*b*) Hutt. 127.

The King *againſt* Hewſon.

Caſe 302.

IE GENERAL QUARTER SESSIONS at *Leiceſter* an order made, that whereas the vill of *Charley* had no conſtable, irt-leet being kept there, the court did order, that *Thomas* nhabitant of *Charley* aforeſaid, ſhould be ſworn to execute of conſtable for the year enſuing there, or until another n his place; and that on the death or removal of the ſaid *Hewſon* from the ſaid office, that ſome one or other of the s ſhould take upon them the ſaid office, *toties quoties* there any vacancy: and afterwards at the ſame ſeſſions another or- ade, reciting the appointment of the ſaid *Thomas Hewſon*, ie, being preſent in court, was divers times requeſted to him the ſaid office, yet he peremptorily refuſed the ſame, pt of the court; for which he was committed to the county he ſhould take upon him the ſaid office, or otherwiſe be charged: which orders being removed by *certiorari*, moved to quaſh them, becauſe the juſtices of peace have ; for the election of conſtables belongs originally to the urns; and the 13. & 14. *Car.* 2. c. 12. ſ. 15. gives power s of peace only in caſe of death, or removal of the conſta- the pariſh, or continuance of a conſtable beyond a year, nly in default of the leet; which is not this caſe, for they conſtable where was never one before.

If there be *a vill*, and no court-leet held within it, the juſtices at ſeſſions may appoint a conſtable, although no conſtable had ever been appointed there before.

S. C. 1. Salk. 175. S. C. Holt, 153. See 1. Mod. 13. 1. Bac. Abr. 439, 440. 2. Show. 75. 2. Stra. 1050.

they could not have impriſoned him for refuſal, but he ve been indicted.

ur. conceſſit.

to the firſt matter, *per* Holt, *Chief Juſtice*, Every vill a conſtable, otherwiſe it is but a hamlet; they are commenſurate

THE KING *againſt* HEWSON.

menſurate one with another; and though a conſtable be pr
of a certain diviſion, yet if a warrant be directed to him by na
execute it out of his diviſion, he may do it; but if it be gen
"to all conſtables, headboroughs," then it muſt be taken reſpec
and they can then act only in their diviſion(*a*). If there be no
all, then you muſt go to the ſheriff's tourn. The leet is
franchiſe derived out of it; and any matters done at the ſh
* [181] tourn which is within the leet's juriſdiction is not void, * and
non judice, but only an infringement of the franchiſe. Ho
juſtices of peace make a conſtable, who is an officer at co
law, and they only by ſtatute, only there may have been ſ
uſage from the neglect of thoſe to whom it properly belo
perhaps there may be ſome old ſtatute for it, which is loſt.
tient uſage for three or four hundred years is good evidenc
law. If an act of parliament be loſt or embezzled, the law r
ſtill. May be the conſervators of the peace did it at commo
That his opinion was, that the juſtices of peace could not c
conſtable where there was none before; though he had he
ſaid, in my *Lord Chief Juſtice* KEILING's time, that if a to
newly built, and they want a conſtable, that the juſtices of
may (*b*).

And it being in this caſe conteſted, whether there was a co
before, it was ordered to be tried.

(*a*) See Rex *v.* Chandler, 1. Ld. Ray. 546. Wallace *v.* King, 1. H. Bl. Rep. 13.

(*b*) See Fletcher *v.* Ingram, Ray, 69. 5. Mod. 127. 1. Sa

Caſe 303.

Anonymous.

Privilege.

IF AN OFFICER plead his privilege by writ, you cannot d
being an officer.

Caſe 304.

Lamb *againſt* Jeniſon.

The ſtile of juſtices in *Durham* is always *itinerant*.

ERROR TO REVERSE A JUDGMENT in *Durham*, in eje
before *juſtices itinerant*.

The error aſſigned was, that a *tales de circumſtantibu* awarded, which ought not to have been; for 5. *Eliz.* c. 25. gives the *tales de circumſtantibus* in *Wales* and the counties pa gives it only before the juſtices of *the great ſeſſions*, and not l *juſtices in eyre*, as theſe are.

But THE COURT held this to be no error, becauſe the ſtile juſtices in *Durham* is always *juſtices itinerant*; and there great ſeſſions at all in the county palatine; and therefore th muſt be underſtood of ſuch courts therein as anſwer to the ſeſſions in *Wales*.

HILARY TERM,

The Ninth of William the Third,

IN

The Court of Chancery.

BEFORE

Somers, *Lord Chancellor.*

Sir John Holt, *Knt. Chief Juſtice of B. R*

Sir Treby, *Knt. Chief Juſtice of C*

Caſe 305.

* Berty *againſt* Lord Faulkland.

Deviſe to *A.* in caſe that within three years after his death ſhe ſhould marry *Lord Guildford*; and then if not, deviſe over; propoſals being made to *Lord Guildford* and refuſed, ſhe marries another perſon. Decreed, this was a condition precedent to the veſting the eſtate, which not being complied with, the eſtate to go over.

Quære, Whether not determined otherwiſe in the Houſe of Lords.

S. C. 1. Eq. Abr. 110. S. C. Salk. 231. S. C. 3. Ch. Caſ. 129. S. C. 2. Vern. 333. S. C. Holt, 230. S. C. 2. Freem. 220. Caſes T. T. 41. 1. Peer. 666. Fearne Con. Rem. 375. 3. Peer. Wms. 65. 1. Atk. 361. 381. 500. 4. Brown's P. C. 3. Atk. 504. Powell on Deviſes, 247 480.

THE CASE was: *John Cary* the teſtator being ſeiſed of the lands in queſtion, by his will, the tenth of *Sept.* 1685, deviſed them to divers truſtees therein-menti and their heirs, under ſeveral truſts therein-mentioned, *viz.* t truſtees, for the firſt three years after his deceaſe, to take the p and employ them to the ſeveral uſes appointed by him; and after the truſtees to ſtand ſeiſed in truſt for his niece *Honor Wills* (now wife to the plaintiff) for her life, "in caſe ſhe ſhall, w "three years next following after his deceaſe, be lawfully ma "to FRANCIS *Lord Guildford*; and in caſe the marriage "take effect, then the remainder to the iſſue male begotten o "body by the ſaid *Lord Guildford*; but if there be no ſuch "or in caſe the marriage ſhall not take effect and be ſolemn "within three years, then the truſt is deviſed to ANTHONY "*Faulkland*, for his life; remainder to his firſt ſon in tail, "and for want of ſuch iſſue, to *Edward Cary* for life; remai "to the firſt ſon in tail, &c." who is the preſent *Lord Faulk* and now defendant. The twentieth of the ſame month the te tor made a codicil, reciting therein his deviſe to his niece *l loughby*, and thereby declared that it was his will, "that if the "marriage did take effect before the age of conſent of them "either of them, that unleſs the ſaid marriage ſhould be confir "by both the parties at the age of conſent, the ſaid niece ſh "have no benefit by the ſaid truſts limited, but they ſhould "unto her." *J. Cary* the teſtator died; after which there

e tranſactions between the truſtees of *Lord Guildford* and *Mrs. Willoughby* concerning the ſaid marriage; but there were ſome underſtandings between them; and by an order of *Lord Chancellor* JEFFERIES, on a petition to him, it was ordered, that the young ſhould not be married to my *Lord Guildford*, unleſs he would ſent to the propoſals made by *Mrs. Willoughby*'s truſtees. The e years expired, and *Mrs. Willoughby* never married to my *d Guildford*; but in the year 1691 married *Mr. Berty*.

BERTY *againſt* LORD FAULKLAND.

NTHONY *Lord Faulkland* died without iſſue; *Edward Cary* ; and *Mr. Berty* and his wife exhibit their bill againſt the tees of *J. Cary* and the firſt ſon of *Ed. Cary*, the preſent *d Faulkland*, to have an account of the profits of * *J. Cary*'s te, and to have a conveyance executed to them according to the ts in the will.

* [183]

Jpon which THE QUESTION is, Whether, ſeeing there was no riage had within three years, and there was no fault in the young ; ſhe ſhould be relieved in equity, and have this eſtate decreed er for life, remainder over to the heirs of her body by *Mr. Berty* otten?

nd it was adjudged by SOMERS, *Lord Chancellor*, aſſiſted by LT, *Chief Juſtice*, and TREBY, *Chief Juſtice*, that the plain- could have no relief.

HOLT, *Chief Juſtice*. All letters and diſcourſes of the teſtator is kindneſs to his niece ought to be totally rejected; becauſe, h before the ſtatute of Frauds and Perjuries, and eſpecially ſince, ought to confine ourſelves to the words of a will, and not have ourſe to any thing extrinſecal or *dehors*; for to explain a will by er papers and declarations, would be to make them part of will; whereas a will is a complete act of itſelf, and repeals all ner wills and declarations whatſoever. In this caſe the plaintiff have no relief: FIRST, Becauſe this eſtate is given to *Mrs. Willoughby* on a *condition precedent*, of her being married to *d Guildford* in three years. Now the nature of a condition cedent is, that it muſt be performed before ever the eſtate can (*a*); and if the performance of the condition become impoſ- by the act of God, yet the eſtate could never accrue to her (*b*); it become impoſſible by any other inevitable accident, as in if *Lord Guildford* had died within the three years after the h of *Cary*, before marriage with *Mrs. Willoughby*, whereby the ition becomes impoſſible by the act of God, yet the land could er accrue to her (*c*). This is the law; I know of no contrary

) Reeves *v.* Hearne, 5. Viner Abr. : Harvey *v.* Aſton, 1. Atk. 361. w. Ready, 1. Wilſ 21. 2. Atk. Reynick *v.* Martin, 3. Atk. 330. Will. 130. Randall *v.* Payne, own's C. C. 55. Manſell *v.* Brown, own's C. C. 473.

(*b*) Popham *v.* Bamfield, 1. Vern. 83. Thomas *v.* Howell, 1. Salk. 170.

(*c*) Peyton *v.* Bury, 2. Peer. Wms. 626. Graydon *v.* Hicks, 2. Atk. 16. Jones *v.* Suffolk, 1. Brown's C. C. 529.

precedent

BERTY *against* LORD FAULKLAND.

precedent in equity; the relief therein has always been in caſe of ſubſequent conditions, which determine an eſtate, and are not favoured in law; as to which, if the condition become impoſſible, the eſtate ſhall not be defeated; but as to a condition precedent the law requires ſtrict performance; and if that become impoſſible, the eſtate can never ariſe. And as the law is ſo, ſo is apparently SECONDLY, the intent of the teſtator; for he gives on a condition which he knew was not in the ſole power of his niece to perform. But then, THIRDLY, that which makes it beyond all contradiction is the codicil, which ſhews that he intended to give her the eſtate on condition that there ſhould be an indiſſoluble eſtate between her and *Lord Guildford*; and the eſtate after her death is only given to ſuch heir male as ſhould be begotten on her body by the *Lord Guildford*: * Where an eſtate has been given on condition, and the ſubſtance of the condition has been performed, there equity has relieved, becauſe the teſtator aimed at ſubſtance, and not at circumſtances. This was the caſe of *Popham v. Rogers* (*a*): A devise was made of lands to *Sir F. Popham*, on condition he ſhould let two-thirds thereof deſcend to his heir; he did not do ſo, but permitted other lands to the value of two-thirds to deſcend; and it was held in equity to be a ſufficient performance of the will, becauſe the deſign of the teſtator was to make *Sir F. Popham* a good huſband to provide for his poſterity; and the intent of the teſtator was ſatisfied thereby. Now here the intent was, that ſhe ſhould marry *Lord Guildford*; ſhe marries one whom it does not appear *Cary* had any kindneſs for. The caſe of *Fry v. Porter* (*a*) is ſtronger than this. *Mrs. Willoughby* was in no fault at all, ſhe did what honour and modeſty would permit.

* [184]

And ſo TREBY, *Chief Juſtice*, agreed it was a hard caſe, but cannot be helped; the will of the teſtator ought to be obſerved, and his eſtate in the ſame manner, and on the ſame conditions, as he limits it.

SOMERS, *Lord Chancellor*. *Mrs. Willoughby* was to take on a condition precedent; nothing was to veſt in her until after the years; at which time, if ſhe was not married to *Lord Guildford*, the truſt was to veſt in *Lord Faulkland*: the previous declarations of his intentions ſignify nothing; the will is an expreſs revocation of them all. As for the conditions not being literally performed, if my *Lord Faulkland* had done any unfair act to hinder her marriage, he being to have advantage by it, equity might have relieved; but on the other hand, I am not clear that ſhe ſhould be relieved if *Lord Guildford* had died or refuſed to marry her. It may be a hard and unreaſonable diſpoſition; we cannot help that; we cannot make a new will. He differed in thinking ſhe had done all that could be done by her; for ſhe put terms on my *Lord Guildford*, where the will put none, and which could not be reaſonably required; but however that be, the precedent condition is not performed

(*a*) 756. 787. 814. 867. 3. Keb. [illegible]

(*b*) 1. Vent. 190. Raym. 236. 1. Eq. Abr. 111. 1. Chan. Caſes, [illegible] 2. Lev. 21. 1. Mod. 86. 300. 2. Keb. 2. Chan. Rep. 26.

nd it is not material to them in remainder what the it is. It cannot be in this caſe objected, that the condition ied in ſubſtance, becauſe the condition is of a thing which : valued. Paying of money, or conveying an eſtate, is of hich will admit of a valuation; but this caſe of marriage Then the proceedings in the time of the *Chancellor* ES; it plainly appears by the ſuggeſtion of the petitions, rders thereon, that * the Lord Chancellor was not informed hole matter; and it is evident they deſigned he ſhould iere was only a petition, and no formal bill, wherein all tereſted might be made parties to it, and have been heard had to ſay relating to the ſame. On the whole matter, I lady was to have no eſtate but on performance of the precedent, which ſhe never did perform. I do not ſee ing was ſincerely done on her part to anſwer the intent of ll; there was a great deal done in a colourable manner, bſolutely refuſed the propoſals made by *Lord Guilford*'s or did as good. Now the defendant is a ſtranger to all ceedings; and therefore I think on the whole, that the ught to execute the eſtate to *Lord Faulkland*, and the heirs his body, remainder to the right heirs of *Cary* the teſtator; *Bert*'s bill be diſmiſſed.

BERTY *againſt* LORD FAULKLAND.

* [185]

ieal was had to the Houſe of Lords, where no determina- ended by compromiſe.

Salk. 232. ſays it was reverſed. *Quære.*

ing *againſt* The Biſhop of Cheſter and Others. Caſe 306.

T OF ERROR from the court of common pleas in a *quare dit.*

Grant to a man by the name of *knight*, who was only *eſquire*, is void.

QUESTION was, Whether an advowſon granted to *Sir Thexton* by *King Charles the Firſt* paſſed?

r EYRE and ROKEBY, *Juſtices*, and HOLT, *Chief Juſtice*, udged, that the advowſon did paſs, and therefore judgment be reverſed (*a*).

S. C. 1. Salk. 560. S. C. 3. Salk. 24. 40. S. C. 5. Mod. 297. S.C. Show. P.C. 212. S.C. Skin. 637. S. C. 1. Ld. Ray. 292. Ray. 292. 5. Mod. 335. 2. And. 32. 3. Lev. 377. Moor. 413 Hob. 224 230. 4. Mod. 2...

ON, *Juſtice*, argued *è contra.*

SOTHER POINT was ſtarted, *viz.* a variance in the grant, l in the letters patent. It is ſet forth in the plea, that *rles the Firſt* granted the advowſon "*W. Thexton, ro, et poſtea militi*," and the letters patent are "*Willielmo n, militi.*"

r reaſon of this variance the judgment was affirmed by d TURTON, *Juſtices*, and HOLT, *Chief Juſtice.*

OKEBY, *Juſtice*, *è contra*; becauſe he ſaid, a grant made by the name of *knight* who is not a knight, is not void,

he pleadings, the ſtate of the e judgment of the Court on this part of the caſe, 5. Mod. 297 to 305.

ſo

THE KING against THE BISHOP OF CHESTER AND OTHERS.

ſo as *conſtat de perſonâ*; and there is nothing in this record to oblige them to take "*William Thexton, Knight*," and "*William Thexton, Eſquire*," for two diſtinct perſons; and therefore the Court would never intend it on purpoſe to make void a grant.

But BY THE OTHER THREE it was held, that a man who is not a knight cannot take by the name of a knight. For, FIRST, "knight" is part of a man's name, as is held by all the Books without contradiction, and is not only an addition (*a*).

* [186]

9. Co. 49. b.

SECONDLY, A knight is a name of dignity, * and a name of dignity is as much part of a man's name as his Chriſtian name; and a grant made to a man by a wrong Chriſtian name cannot be good; it muſt *conſtare de perſonâ*, not in the plea only, but in the grant itſelf. Now it does not appear by that, that "*William Thexton, Knight*," and "*William Thexton, Eſquire*," are the ſame perſon. Now the name of *eſquire* is certainly drowned in the name of *knight*; for all names of worſhip are drowned in names of dignity.

But it is objected, that though a man be no real knight, yet he may be a reputed knight; ſo a name of reputation will be a ſufficient deſcription to take by.

To which it was anſwered: Firſt, That he who is a reputed knight, and yet is not a knight, cannot take by that name; for where a man takes by name of reputation, there muſt be ſome foundation to ground that reputation upon; as there is in caſe of a baſtard, who takes by name of a ſon; but there is no foundation for a man to be a knight who is no knight.

But it may be objected, that names of dignity may be ſupported by reputation; as the eldeſt ſon of a duke hath the title of a marquis or earl. Now ſuppoſe a grant was made to the eldeſt ſon of a duke by the name of marquis, that grant would be good, becauſe there is a foundation for it: for by the laws of heraldry, every duke's eldeſt ſon takes place as marquis, that is, after all real marquiſſes; and the common uſage of the realm gives them thoſe titles in all writings now-a-days; but the old conveyances were cautious in ſo doing, they called them ſuch a one "eſquire, commonly called marquis, &c.; and even in modern conveyances they are always mentioned to be "the eldeſt ſon of ſuch a one." It is ſaid by HUTTON and RICHARDSON, in the debate of the *Earl of Pembroke's Caſe* (*b*), that if a grant be made to one by the name of knight who is no knight, it is a good grant; but there is no foundation for it; for if that be ſo, the name ſignifies nothing; and *Thomas* may as well take by the name of *John* as an *eſquire* by the name of *knight*: but ſuppoſing reputation would have done, yet the defendant ſhould have averred, that he was "an eſquire, *ſed cognit. et reputat.* by the name of knight."

Vide 8. Co. 16. b.

EYRE, *Chief Juſtice*. If a feoffment be indeed made to a man by a wrong name, but livery is made to him in perſon, there the

(*a*) See Year-Books 4. *Hen.* 7. pl. 7. 32. *Hen.* 6. pl. 29. 8. *Edw.* 4 pl. 23. 2. Inſt. 594. Hutton, 41.

(*b*) Litt Rep. 223.

feoffment

ood; but the reaſon of that was, becauſe it was a ſufficient tion of the perſon, there being but one *Lord Ewer* at the time: *Co. Lit.* 3. *a.* if lands be given to *R. Earl of Pembroke*, his name is *Henry*, or *George Biſhop of Norwich*, when his s *John*, the grant is good, becauſe there can be but one *Earl broke* or *Biſhop of Norwich* at a time; but here the grant *ir William Thexton, Knight*, and the defendant pleads it to *n Thexton, Eſquire*, which are two ſeveral perſons; for which judgment ought to be affirmed.

; judgment was afterwards reverſed in the Houſe of Lords.

2. Rep. 181. 197. 223. 1. Cro. (*b*) Cro. Jac. 240. 1. Bulſt. 21.
nes, 215.

EASTER TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Samuel Eyre, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General*
John Hawles, *Eſq. Solicitor General.*

Caſe 307.

Money to be brought into court on *aſſumpſit*, but not on *quantum meruit*.

Smith *againſt* Johnſon.

CASE for work done on a *quantum meruit*, and alſo *indebitatus aſſumpſit*. Upon motion to bring ſo much mo into court, and to be ſtruck out of the declaration, the C granted it as to the *indebitatus aſſumpſit*, but refuſed it as to *quantum meruit*; and the Court ſaid, that ſuch motions had ſometimes * obtained, where a *quantum meruit* and *indebit* were joined together, yet regularly they ought not to be gra on a *quantum meruit*, for who can tell what a man deſerves unt be tried (*a*).

(*a*) See Burman *v.* Shepherd, ante, 90. Pawlett *v.* Heatfield, ante, 95. Lawley *v.* Dibble, poſt. 241. Farrell's Caſe, poſt. 397. But as to the origin of this practice, and in what caſes it preſent allowed, ſee Tidd's Practice, to 414. and the caſes there cited.

Caſe 308.

Certiorari to remove an indictment out of *Weſtmorland*, for uſing a trade not being an apprentice.

The King *againſt* Haggard.

INDICTMENT at *Kirby*, in *Weſtmorland*, on the 5. *Eliz.* uſing a trade, not having been apprentice thereto ſeven ye and a *certiorari* was prayed.

But THE COURT doubted whether to grant it; becauſe the tute is, that it muſt be tried in the proper county; ſo that if i removed hither, it muſt be ſent down again by *procedendo*, and filed here, ſo as to be quaſhed; but there having been ſeveral *certiorari*'s granted, they granted one in this caſe; and afterw granted another in a like caſe in *Trinity Term* following, in the of one *Woods*, of *Norfolk*.

Te

Temple *againſt* Biſhop.

Caſe 309.

Bill of *Middleſex* taken out by four, abates by death of one; and new writ muſt be taken out by ſurvivors by journies accounts.

[was held PER CURIAM, That where four took out a bill of *Middleſex*, by the death of one of them the writ abated, and a new it ſhould have been taken out in the name of the three ſurvivors journies accounts; and when one of them died, the bill abated, d a new bill ſhould have been taken out in the name of the two vivors only by journies accounts.

Chaloner *againſt* Claiton.

Caſe 310.

Whether in a rejoinder a title muſt not be ſet forth. *Quære.* S. C. 3. Salk. 306. S. C. Comb. 478.

EPLEVIN. The defendant avowed for rent, that he was poſſeſſed of a houſe for divers years then and yet to come, and t he leaſed it to the plaintiff from year to year, &c. The plain- replied, *nil habuit in tenementis.* The defendant rejoined, *quod s habuit in tenementis*; and upon demurrer to rejoinder,

It was alledged, that the defendant in the rejoinder ſhould have forth a title.

But NORTHEY *for the defendant* moved, that there was no neceſ- y ſo to do; for though in debt for rent, if the defendant plead in " *nil habuit in tenementis*," the plaintiff in his replication muſt ew a title, becauſe in debt for a rent, * the plaintiff is not obliged * [189] ſhew a title in his declaration, but *quod cum dimiſit* is ſufficient, in an avowry it is otherwiſe; for in an avowry ſome kind of e muſt always be ſhewn, as was here, *viz.* that he was poſſeſſed divers years then and yet to come; which being done, there is neceſſity to ſet out a title again in the rejoinder (*a*): whereon Court took time to conſider.

And afterwards NORTHEY ſaid, he could not make good the owry, and therefore prayed leave to amend, paying coſts.

Quod CUR. *conceſſit.*

a) See the ſtatute 11. *Geo.* 2. c. 19. Sillyvan *v.* Stradling, 2. Wilſ. 208. and Caſe of Silly *v.* Dally, poſt. 190.

Brag *againſt* Digby.

Caſe 311.

Variance between the writ and count cannot be pleaded without craving *oyer* of the writ. S.C.2.Salk.658. 3. Lev. 236. 1. Saund. 118. 6. Mod. 303. Andr. 76.

ASE on ſeveral promiſes. On original, the defendant, without craving *oyer* of the writ, pleaded a variance between the writ the count, ſhewing particularly wherein.

Whereupon the plaintiff demurred; for though the writ be in , yet it is on a diſtinct roll from the count; and no advantage be taken of it, without craving *oyer* (*a*).

CUR. *conceſſit*; and a *reſpondeas ouſter* was awarded.

ee 2. Wilſ. 85 295. Boats *v.* Edwards, Dougl. 227. Rex *v.* Amery, Rep. 150.

Caſe 312.

Carter *againſt* Shepherd.

By receiving money, and putting it into a bag, the property is altered, and detinue will lie for it.

TROVER for a goldſmith's note for one hundred pounds. The fact was: *Carter* had a note of *Shepherd*'s; while *Shepherd* was paying him the money, *Carter* put fifty pounds into his bag of the money, after it was told, and laid it on the counter while the reſt was telling; during which time the fifty pounds in the bag was ſtolen.

S. C. 5. Mod. 398.
S. C. 1. Salk. 567.
S. C. Comb. 475.
S. C. 1. Ld. Ray. 330.
Hob. 154.
6. Mod. 36.
2. Salk. 442.
3. Lev. 299
3. Mod. 86.

THE QUESTION was, Whether *Carter*, by putting the money into the bag, had ſo appropriated it to himſelf that he ſhould ſtand to the loſs thereof?

And THE COURT held that he ſhould; for the poſſeſſion of it was the ſame as if he had put it into his pocket, and he might have detinue for it after it was in his bag.

And accordingly THE COURT ordered, that whereas he had a verdict for one hundred pounds, he ſhould have judgment for one hundred pounds, and make a releaſe for fifty pounds on record.

2 Mod 23. 3. Lev. 299. Ld. Ray. 928. Comy. 138. 3. Bac. Abr. 562.

* [190]

Caſe 313.

Dubarton *againſt* Chancellor.

Plea in abatement, and judgment thereon, ſhould be entered on the iſſue-roll.

CASE on ſeveral promiſes. Plea in abatement, and *reſpondeat ouſter*; *non aſſumpſit* pleaded, and carried down to trial by *niſi prius*, and verdict for the * plaintiff.

S. C. 5. Mod. 399.
S. C. Carth. 447.
S. C. 1. Ld. Ray 329.
5. Mod. 212.
2. Salk. 47. 53.

And it was moved, that the entire record was not carried down for the plea in abatement, and judgment thereon, was not entered on the iſſue roll, which they ought to have been, and not to have made two rolls; for the plea in bar ought to be entered on the ſame roll with the plea in abatement; and ſpecial verdict.

And for this the verdict was ſet aſide.

3. Bulſt. 311. Carth. 506. Comb. 393. Dyer, 260.

Caſe 314.

The King and Morrice *againſt* The Mayor and Commonalty of Lincoln.

Quakers may take their ſolemn affirmation on admiſſion to their freedom.—S. C. Carth. 448. S. C. 5. Mod. 402.

MANDAMUS to admit *Morrice* to the freedom of the city of *Lincoln*, he having ſerved ſeven years apprentice; which the mayor refuſed (*a*); becauſe he refuſed to take the freeman's oath.

(*a*) By 12. *Geo.* 3. c 21. "Where any perſon ſhall be intitled to be admitted to his freedom, and ſhall apply to the mayor of the corporation, or other perſon who is authoriſed to adminiſter, &c. to be admitted a citizen, burgeſs, or freeman thereof, and ſhall give notice ſpecifying the nature of his claim to ſuch mayor or other perſon, that if he or they do not admit ſuch perſon within *one month* from the time of ſuch notice, the court of king's bench will be applied to for a *mandamus*; if ſuch mayor, &c. ſhall after ſuch notice refuſe or neglect to admit ſuch perſon, a *writ of mandamus* ſhall iſſue to compel ſuch mayor, &c. to admit ſuch perſon, &c."

ıg *a quaker*, but offered to make his ſolemn affirmation, ng to the late act 7. *Will.* 3. c. 34. (*a*).

THE KING AND MORRICE *againſt* THE MAYOR AND COMMONALTY OF LINCOLN.

THE COURT were of opinion, that he ought to be admitted olemn affirmation; for the office of a freeman is no place t, or office in the government, within the ſtatute (*b*). By ing his apprenticeſhip he had a right in the freedom, and his on, whereunto the taking of an oath is not eſſential, but only om; and the intent of the act was, that, unleſs in thoſe caſes d by *proviſo*, the affirmation of a quaker ſhould be as avail- his oath; and though it was returned in this caſe, that every ı had the liberty to run a cow upon the common within the y, yet that will not alter the caſe (*c*).

A *mandamus* quaſhed for miſ-direction.

becauſe the writ was directed "To the mayor of the city of oln, in the county of *Lincoln*," and not "in the county of ity of *Lincoln*," the writ was quaſhed, there being no ſuch o whom a *peremptory mandamus* ſhould go.

ntinued by 13. & 14. *Will* 3. made perpetual by 1. *Geo.* 1. —By 8. *Geo.* 1 c. 6. the ſeveral which quakers are required to eclaration of fidelity, the ſolemn ı, and the oath of abjuration, ed; and by 22. *Geo.* 2. c. 46. is enacted, "that in all caſes by any ſtatute then made, or ter to be made, *an oath* is re- the ſolemn affirmation or de- n of the people called quakers e allowed and taken inſtead of ath, except in *criminal caſes*, "or to ſerve on juries, or to bear any "office or place of profit in the Govern- "ment."

(*b*) LORD MANSFIELD, in the caſe of Rex v. March, recognized the above caſe as good law; and it is determined, that a quaker may, on his ſolemn affirmation, be admitted a member of *the Turky Company*, although by 26 *Geo.* 2 c 18. ſ 2 it is enacted, that "no perſon, unleſs he take "*the oath* therein preſcribed, ſhall be ad- "mitted to his freedom in the ſaid Com- "pany." 2. Burr. Rep. 1000.

(*c*)

Silly *againſt* Dally. Caſe 315.

In an avowry, whenever title is made under a particular eſtate, the commencement of it, and the original whence derived, muſt be ſet forth in pleading.

S. C. 2. Salk. 562.
S.C.Comb. 476.
S.C. Carth. 444.
S. C. Holt, 610.
S.C. 1. Ld. Ray. 331.
S.C. 1. Brown's
3. Mod. 232.

LEVIN. The defendant makes conuſance as bailiff to T. for that long before *J. T.* grandfather of the preſent was poſſeſſed for five hundred years, commencing from the of *July* 1645 of a certain meſſuage and fourteen acres *Trelcage*, in the pariſh of *St. Brago*; and alſo of another e and forty-four acres called *Trevanion*, in the * ſame of which laſt mentioned tenement the place where is par- d that being ſo poſſeſſed, on the firſt of *Auguſt* 1645, he or four hundred and ninety-nine years, three quarters of a vo months and three weeks, to *A. B.* reſerving ſixteen *per annum*; that the grandfather, being poſſeſſed of this n of a term, made his will, and made *J. T.* father of the *J. T.* and *Jane* his wife, executors jointly, and reſiduary ; that *Jane* died, and *John* ſurvived; that *J.* died, and e preſent *J. T.* his executor, as bailiff to whom he made ce for the ſixteen pounds rent arrear.

P. C. 74. Cro. Car. 138. Yelv. 74. 147. Lutw. 1492. 1497.

SILLY *againſt* DALLY.

The plaintiff demurred, becauſe it was not ſaid how the grandfather was ſeiſed, or who made that long leaſe; and the eſtate not ſet out of which the leaſe is derived; for whenſoever the defendant in an avowry ſets out a title in a particular eſtate, he muſt ſhew from whom the eſtate is derived. 1. *Inſt.* 303. *b.* 1. *Cro.* 571. *Stevens v. Hawkins.* *Yelv.* 147. *Witham v. Barker.* 1. *Cro.* 138. *Sidvill v. Avery.*

Ante, 188, 189.

PER CURIAM. It is true, that if the leſſor bring debt for rent againſt the leſſee or aſſignee, he need only ſay *quod cum dimiſit*, without ſhewing his eſtate; but an avowry is different from a count in this as well as in other caſes (*a*); for if you declare in debt for rent, there one plea goes to the whole declaration, as *nihil debet* does; but no general plea goes to the whole avowry. If in this caſe you had ſet forth a ſeiſin in fee in ſome one who made the leaſe to *J. T.* it had been very proper to have traverſed the ſeiſin in fee; but inſtead of a ſeiſin you have alledged a poſſeſſion; and there never was ſeen ſuch a traverſe as "*abſque hoc poſſeſſionat. fuit.*" Beſides, whereſoever you ſet forth a particular eſtate, you muſt ſhew the original from whence it is derived; if you have the ſeiſin in fee, it is ſufficient to alledge that generally, becauſe that gives him a good title againſt all men except the diſſeiſee. But now particular eſtates are not framed by the law, but by contract; and therefore you muſt ſhew what that contract is, and how it came to be made; if it is carved out of an eſtate that is able to ſupport it; and therefore, becauſe the original eſtate is not ſet out from whence this particular eſtate is derived, the avowry is ill.

Poſtea, Paſch. 13. *Will* 3. Pell *v.* Garlick.

Vide 2. Cro. 43. 46. 52. 70. Diverſity.

And judgment for the plaintiff (*b*).

In this caſe was cited the caſe of *Harris v. Parker*, 2. *Vent.* 253, 270. which was, Debt for rent on a demiſe by the plaintiff to the defendant; the defendant pleaded, that the plaintiff "*nihil habuit in tenementis*;" the plaintiff replied, that he was poſſeſſed of a leaſe of forty-one years made to him by the *Lord W.* who had full power to * demiſe; and though the judgment was reverſed for a fault in the declaration, yet the replication was held good, without ſetting forth a title; which HOLT, *Chief Juſtice*, ſaid was true; and that in that caſe it was not neceſſary to ſet out a title, for "*nihil habuit in tenementis*" was the iſſue; for if the defendant plead, "*nihil habuit in tenementis*," the plaintiff may reply, "*quod habuit in tenementis, ſatis habuit in tenementis*," VIZ. *in feodo*, or any other eſtate, as

* [192]

See Chaloner *v.* Clayton, ante, 189.

(*a*) By the ſtatute 11. *Geo.* 2. ch. 19. ſ. 22 defendants in replevin may avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon the diſtreſs was made, enjoyed the ſame under a grant or demiſe at ſuch a certain rent, during the time wherein the rent diſtrained for incurred; which rent was then and ſtill remains due; or that the place where the diſtreſs was taken was parcel of ſuch certain tenements held of ſuch tenure, &c.; for which tenements the rent, &c. was at the time of the diſtreſs and ſtill remains due; without further ſetting forth the grant, tenure, demiſe, or title, of ſuch landlord, &c.

(*b*) This judgment was affirmed in the Houſe of Lords, 1. Brown P. C. 77.—See alſo Johns *v.* Whitney, 3. Will. 65. the ſame point, and this caſe of Silly *v.* Dally held to be good law.

the

whereof he may give any other eſtate in evidence, the
g any particular eſtate being only form; the iſſue being,
r he had anything in the premiſes? It was alſo ſaid by
Chief Juſtice, that the caſe of *Witham v. Barker* (*a*) was a
t.

SILLY *againſt* DALLY.

(*a*) Yelv. 147.

d *againſt* Sir Richard Raines, Judge of the
ſiſtory Court of the Biſhop of Lichfield and
entry.

Caſe 316.

IELD was libelled againſt in the ſpiritual court *ex officio*,
teaching ſchool contrary to the ſeventy-ſeventh canon,
03, which is, "That no man ſhall teach ſchool except
ed by the biſhop, and otherwiſe qualified as the canon pre-
s."

Whether a layman may be ſued in the ſpiritual court for teaching ſchool without licence.

now *Oldfield* prayed a prohibition; ſuggeſting, that every
ommon law may teach and inſtruct another; that all canons
to the law of the land are void, and do not bind the laity,
he is one; that the ſtatute of 1. *Jac.* 1. and 13. *Car.* 2.
ointed penalties for keeping ſchools without licence; and
expoſition of all ſtatutes belongs to the king's courts.

Salk. 672. 330. Carth. 464. Comb. 324.

ingle queſtion was, How far this canon binds a layman?

h HOLT, *Chief Juſtice*, ſaid was no queſtion to be deter-
n a motion; and therefore granted a prohibition, and that
lare upon it.

Clerk *againſt* Pigot.

Caſe 317.

UMFSIT on a bill of exchange the caſe was: *Dunkin* drew
of exchange at *Briſtol* on *Pigot* in *London*, payable to *Clerk*
, at twenty-eight days ſight. *Clerk* living at *Briſtol* ſends
vith *Keen* to *London*, with his name indorſed thereon, but a
ace over his name. *Keen* preſents it to *Pigot*, who accepted
for non-payment *Clerk* brought this action.

Name indorſed on a bill of exchange may be uſed as an aſſignment, or for diſcharge when paid.

t was alledged, that the action ſhould have been brought
; becauſe, by *Clerk*'s indorſing his name, the property was
ed from him to *Keen*.

* [193]

S. C. Salk. 126.

OLT, *Chief Juſtice*, held (*a*), that there being a blank ſpace
the name of *Clerk*, as is uſual in bills of exchange, it was at
ion of *Keen* either to make uſe of it as his ſervant or order.
filled up the blank ſpace with making it payable to him,
ght have done if he would, then the property of the bill had
nſferred to him, and he only could have maintained this

(*a*) At the Sittings at GUILDHALL, *London*.

CLERK *againſt* PIGOT.

action againſt the acceptor; but ſeeing he has not filled up the blank ſpace, he thereby declares his intention to have acted only as a ſervant of *Clerk*'s, whoſe name was put there, that, on payment thereof, a receipt might be writ for the money over his name; therefore action maintainable by *Clerk* (*a*).

(*a*) See Lucas *v.* Marſh, in the common pleas, M.ch. 10. *Geo.* 2. in the continuation of 7. Mod. Theed *v.* Lovel, 2. Stra. 1103. and Kyd on Bills of Exchange, 88 to 109.

Caſe 318.

Cromwell *againſt* Grumſdale.

If what was the intent of the parties can be underſtood, the bond is good.

S. C. 5. Mod. 281.
S. C. Salk. 462.
S. C. 1. Ld. Ray. 335.
S. C. Comb. 477.
S. C. 3. Salk. 73.
S. C. Holt, 122. 502.
2. Roll. Abr. 147.
Cro. Jac. 208.
Hob. 19. 116. 119.
Yelv. 65.
2. Jones, 58.
Comb. 60. 86. 187. 226
Carth. 204.
3. Bac. Abr. 693.
Comp. 148.

DEBT AGAINST THE DEFENDANT as adminiſtrator of *Roger Urlin* for forty pounds, for that the ſaid *Roger*, on the tenth of *July* 1674, *per ſcriptum ſuum obligatorium, cujus datus eſt eiſdem die et anno ſupradict. cognovit ſe teneri et firmiter obligari præfat. Georg. in præd. quadraginta libris, per hæc verba*; *quadrans lib.* payable on requeſt.

The defendant pleaded, *non eſt factum prædict. Richardi Urlin.*

The jury find, *quod quidam R. Urlin inteſt. præd. Grumſdale* did ſeal and deliver a certain writing in form of an obligation, *in hæc verba*; by which he obliged himſelf to the ſaid *George Cromwell per mid. viginti in quadrans lib. bonæ et legalis monetæ Angliæ, ad quam quidem ſolutionem* he obliged himſelf, his executors, adminiſtrators, and aſſigns, *firmiter per præſentes ſigillo ſigillat. dat. primo die Julii, anno regni Regis Carol. Secund.* 1674, conditioned for the payment of twenty pounds twelve ſhillings on the twenty-fifth of *December* next enſuing the date thereof, &c. &c.

HOLT, *Chief Juſtice*, who delivered the opinion of the Court, ſaid, that the bond was as ſilly and inartificial as could be; yet the intention of the parties being apparent, the plaintiff muſt have judgment. As for the *quadrans lib.* if there had been nothing further to explain it, we ſhould have made nothing of it; but the word *quadrans* here being ſomething of four, and it appearing by the condition to be for the payment of twenty pounds, we cannot underſtand it to be meant of any * other ſum than forty pounds; and if the meaning does ſufficiently appear, we ought to conſtrue bonds and agreements not according to the ſtrict words, but according to the intention of the parties. "*Seſſanta*" is as unintelligible as this; and ſo is "*quantoginta* (*a*)." We have ſearched the rolls of the caſe of *Dodſon v. Key* (*b*), and find it exactly the ſame as reported in *Yelv.* 193. As to the "*per mid. viginti*," that is inſenſible, and therefore cannot hurt. Then as to the *cujus dat.* in the declaration, there is no ſuch date as *anno regni* 1674; it is a void date, and the plaintiff may alledge the deed to be made when he will; and though by the *profert hic in cur.* he has confined himſelf, yet the *cujus datus* ſhall be underſtood of the delivery, and not the date; *cujus datus* ſhall be the giving of which was, &c: if it had been *gerent.* date, it might have been otherwiſe; but here it is good enough.

* [194]

Poſtea, Mich. 10. *Will.* 3. Pullen *v.* Benſon.

Therefore judgment was given for the plaintiff.

(*a*) T. Jones, 48.
(*b*) S. C. Cro. Jac. 261. S. C. 1. Brownl. 110.

Atkinſon

Atkinſon *againſt* Corniſh.

Caſe 319.

E PLAINTIFF brought an action as adminiſtratrix of her huſband during the minority of her four children *A. B. C.* and dminiſtrators *cum teſtamento annexo*; and avers, they were the age of twenty-one. The defendant pleads, that *A.* the was of full age the firſt of *October* laſt. The plaintiff replied, ne was not then of full age; and tendered an iſſue. The lant demurred.

Adminiſtration granted *durante minore ætate* of an executor ceaſes at ſeventeen; of an adminiſtrator at twenty-one.

S. C. 3. Danv. 356.
S. C. 5. Mod. 395.
S. C. Comb. 475.
S C. Carth. 446.
S. C. Holt, 43.
S. C. 1. Ld. Ray. 338.

d it was objected, that judgment ought to be for the defendecauſe the plaintiff did not aver the children were under the ſeventeen (at which time adminiſtration *durante minoritate* ceaſe), but only under the age of twenty-one years.

Poſtea, Mich. 12. *Will.* 3. Dubois *v.* Trant. Paſch. 13. *Will.* 3. Reek *v.* Thomas. Cro. Eliz. 602.

PER CURIAM, The diverſity is, if adminiſtration be granted *te minoritate* of an executor, there adminiſtration ſhall ceaſe the executor comes to ſeventeen; but if adminiſtration be d *durante minoritate* of one who is not an executor, but only iſtrator, there adminiſtration *durante minori ætate* does not till twenty-one.

gment was given for the plaintiff.

5. Co. 29. Fitzg. 163. 1. Vent. 219. Comy. 109. 159. 4. Burn's E. L. 239. 2. Bac. 2. 3. Bac. Abr. 121. 1. Ld. Ray. 667. Harg. Co. Lit. 89. b. note (6).

TRINITY TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 320.

* The King *againſt* Kitchner.

Indictment for enticing away an apprentice.

INDICTMENT for cauſing an apprentice to abſent himſelf from his maſter, and keeping and detaining him in that abſence.

6. Mod. 99. 182. 289. Salk. 380. Poph. 132. 3. Burr. 1698. 4. Com. Dig. "Indictment" (I). Hart v. Aldridge, Cowper, 54.

It was moved to quaſh it, becauſe it is not a thing of a public nature, being no other than an action on the caſe.

But THE COURT ſaid it was a great offence, and would not quaſh it; but left the party to demur if he would.

Caſe 321.

Williams *againſt* Drury.

Miſnomer may be pleaded in abatement, without laying a *venue*. Ante, p. 125. 1. Saund. S. 49. 6. Mod. 105.

ASSUMPSIT. The defendant pleaded *a miſnomer* in abatement; whereupon the plaintiff demurred, becauſe the defendant had laid no *venue*.

But THE COURT held, that there need not in this caſe, becauſe it is a plea concerning the perſon, and ſo muſt be tried where the action is brought.

Tom

Toms *againſt* Loyd.

Caſe 322.

AN ACTION ON THE CASE for money received to the plaintiff's uſe. The defendant pleaded his privilege in the exchequer, whereon the plaintiff demurred; and judgment for the defendant; who prayed coſts by virtue of 8. & 9. *Will.* 3. c. 11. whereby it is enacted, "that, for preventing frivolous and vexatious ſuits, if "on any demurrer judgment ſhall be given againſt the plaintiff, "the defendant ſhall have judgment to recover his * coſts."

Where judgment is for the defendant in a plea in abatement, he ſhall not have coſts.

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S. C. 1. Ld. Ray. 336. S. C. Comb. 482. S. C. Salk. 194. Poſt. 523. 609. Barnes, 120. 257. Hullock on Coſts, 149.

But THE COURT were of opinion, that judgment on demurrer, upon a plea in abatement, for the defendant, is not within this act; the intent of the act being only to give the defendant coſts where the plaintiff ſhould have had it, if judgment had been given for him. Now if the plaintiff had judgment on demurrer, in a plea in abatement, he has then no coſts, though there be ſome conſideration thereof, at the end of the cauſe, in coſts. Beſides, the intent of the act is "to prevent frivolous and vexatious ſuits;" and on judgment for the defendant, on a plea in abatement, it does not appear to the Court that the action is either frivolous or vexatious; ſo that it muſt be underſtood of a demurrer, where there is a judgment final.

Wilkins *againſt* Mitchell.

Caſe 323.

DEBT FOR RENT in the court of *Cambridge*, where upon the evidence the plaintiff was nonſuited. The defendant had judgment, but THE MAYOR refuſed to execute the ſame, taking ſecurity from the plaintiff for his indemnity.

Mandamus refuſed to execute a judgment in an inferior court; it muſt be by writ *de executione judicii* out of chancery.

Whereon *a mandamus* was moved for, or that THE MAYOR ſhould ſhew cauſe why he ſhould not execute the ſaid judgment.

But THE COURT denied the motion, ſeeing he had a legal remedy (*a*), *viz.* a writ *de executione judicii* out of chancery.

S. C. 3. Salk. 229.

(*a*) See Rex *v.* Gray's Inn, Dougl. 353 to 357. Rex *v.* Biſhop of Cheſter, 2. Term Rep. 396. Rex *v.* Marquis of Stafford and T. Giffard, 3. Term Rep. 647.

Gardner *againſt* Booth.

Caſe 324.

A PROHIBITION was granted in a ſuit of tithes, on a ſuggeſtion of a *modus*; and conſultation was prayed, becauſe they had not proved their ſuggeſtion.

On ſuit for tithes, ſuggeſtion of *a modus*; the ſuggeſtion muſt be proved.

And PER CURIAM, Suppoſing the plaintiff had declared in a prohibition, and the defendant had pleaded thereunto, yet the ſuggeſtion, by force of the ſtatute, muſt be proved within ſix months. But then the ſuggeſtion is entered on the roll, and for that the roll muſt

S. C. 2. Salk. 548.

GARDNER *against* BOOTH.

must be brought into court, that it may be ſeen whether there be a proof thereon or no. After which, it appearing no proof had been made, a conſultation was awarded.

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Caſe 325.

* The King *againſt* James.

Certiorari lies into *Wales*.

8. Mod. 135. Stra. 553. Wilſ. 320. Atk. 75. 182. 3. Term Rep. 654. But upon this ſubject ſee 4 Hawk. P. C. 7th edit. ch. 27. ſ 25, &c.

INDICTMENT in the grand ſeſſions of *Wales*, and *certiorari* granted to remove it, at the prayer of the defendant.

And now *a ſuperſedeas* was prayed to the writ; becauſe a *certiorari* does not lie into *Wales*; or if it does, it is only when THE KING directs or deſires it, and not at the deſire of the defendant.

But THE COURT held that *a certiorari* lies either at the deſire of THE KING, or of THE PARTY, according as the Court ſhall think fit; and accordingly a rule was given for the return of the *certiorari*, and that the indictment ſhould be tried in the next *Engliſh* county.

Caſe 326.

William Ellis *againſt* Grace Ellis, Executrix of John Ellis, the Son of the ſaid William Ellis.

Entered Michaelmas Term, 9. Will. 3. Roll 190.

Infant chargeable for money lent to buy neceſſaries, if ſo laid out.

S.C. Comb. 482. S. C. 5. Mod. 368. S. C. 3. Salk. 197. S. C. 1. Ld. Ray. 344. 1. Salk. 279 396 2. Stra. 1083. 3. Bac. Abr. 134. 3. Com. Dig. "Enfant" (C. 2.). 1. Term Rep. 40.

INDEBITATUS ASSUMPSIT on two promiſes for one hundred pounds. The defendant pleaded infancy in her teſtator at the time of the reſpective promiſes. The plaintiff replied, *proteſtando* that he was not an infant at the time of the promiſes, *pro placito dicit* as to the ſaid two promiſes, *quod ipſe erogabat, extraponebat, et ſolvebat* 60*l. parcell. inde, et quamlibet parcellam præd.* 60*l. pro cubiculis*, ANGLICE lodgings, *pro præfat.* JOHANNE ELLIS, *et prædict.* GRATIA *(præd.* JOHANNE *et præd.* GRATIA *conjugat. exiſtent.), ac pro emptione neceſſariorum, et potu, et victu et ſuſtentatione corporum præf.* JOHANNIS *et præd.* GRATIÆ, *et familiæ ſuæ, prædict.* JOHANNE *ad tunc habente liberos; et hoc paratus eſt verificare, &c. Et quoad* 40*l. reſid. inde et quælibet parcella præd. quadraginta lib. fuerunt pro emptione neceſſariorum, &c. et ſic præd.* 40*l. per ipſum* WILL. ELLIS *præfat.* JOHANNI *mutuat. et accommodat. et per præfatum* JOHANNEM ELLIS *mutuo habit. et recept. per præfatum* JOHANNEM ELLIS *expendit. et erogat. et extrapoſit. fuerunt, &c. et hoc paratus eſt verificare.* Whereon the defendant demurred in law.

And it was not now queſtioned, but that an infant ſhall be chargeable for neceſſaries for his family, as well as for himſelf; but the great objection to the replication was, that though a man may find neceſſaries for an infant, yet he cannot ſafely lend money to an infant to provide neceſſaries for himſelf.

As to which THE COURT were of opinion, that if the infant ſpend the * money otherwiſe, then he ſhould not be chargeable; but

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lay it out in neceſſaries, according to the lending, as it is n the replication he did, then he ſhall be chargeable; be- s the ſame as if the lender had bought the neceſſaries for which employment being traverſable, a *venue* ſhould ı laid.

WILLIAM ELLIS *againſt* GRACE ELLIS

ıich omiſſion THE COURT gave judgment *quòd querens per billam.*

Earl *v.* Earl, 1. Salk. 386. oucher, 1. Salk. 279. Mar- field, 1. Peer Wms. 558. Harris *v.* Lee, 1. Peer Wms. 482. Fonblanque's Equity, 68.

The King *againſt* Dixon and Hollis. Caſe 327.

TMENT againſt two defendants, who were overſeers of ghway, for not repairing or cauſing to be repaired the : and it was quaſhed, becauſe an indictment for not re- ıuſt always be againſt the pariſh; the overſeers not being repair the ways, but only to give notice to the pariſh to repair them.

Pariſh to be indicted for not repairing a highway, and not the overſeers.

Anonymous. Caſe 328.

IT OF ERROR from the court of common pleas, in an ɔn, was brought here by an attorney, by bill of privilege, *legii de proſequendo* found, and ſo returned on *a certiorari*; ıat cauſe judgment was reverſed.

Judgment reverſed for want of bail in error.

he King *againſt* Sir Henry Bond, Baronet. Caſe 329.

. BOND brought a writ of error to reverſe an outlawry igh treaſon, and aſſigned for error, that whereas the ſtatute *n.* 5. c. 5. doth enact, "that in every indictment, &c. ſhould be mention made of the true addition of their pro- , faculty or myſtery, or eſtate and degree, and that the of his commorancy ſhould be mentioned;" *unde ex quo* ıe indictment he is not named *Baronet*, nor hath other ſuf- ldition, *in hoc eſt erratum*; and ſo likewiſe as to the place mmorancy.

igned alſo another error in the proceſs of outlawry, *viz.* of a *capias*; which THE ATTORNEY GENERAL con- vhereon his outlawry was reverſed; and being arraigned ıdictment,

, *Chief Juſtice*, ſaid, that *Sir Henry Bond* had his elec- ıer to take advantage of the exception to the indictment, of addition, or waive it, and plead the king's pardon; for tment is not to be quaſhed by the ſtatute, except he take e of it.

ccordingly he waived his exception, and pleaded his pardon.

Indictment of treaſon is not to be quaſhed for want of addition, unleſs the perſon takes advantage of it.

S. C. 1. Ld. Ray. 345.
S. C. Andr. 146.
2. Roll. Rep. 225.
2. Inſt. 670.
Latch, 109.
4. Leon. 121.
Stiles, 26.
1. Vent. 338.
4. Hawk. P. C. ch. 23. ſ. 123.

The

Caſe 330.

* The King *againſt* Robert Fielding.

The ſtatute of 1. *Hen.* 5. c. 5. of Additions, is a general law, of which the Court will take notice.

ROBERT FIELDING was attainted by outlawry for high treaſon by the name of *R. F. Eſquire*, and in Term had his pardon allowed;

See 1. Com. Dig. "Abatement" (E. 22.) (F. 22.) (H. 4). 5. Com. Dig. "Pleader" (C. 9.).

And now he brought a writ of error, and aſſigned for error that at the time, and before, and after the caption of the indictment, he was known by the name of *Robert Fielding, Yeoman*, and not *Armiger*, as in the indictment.

HOLT, *Chief Juſtice*, ſaid, it were a better aſſignment to have recited the ſtatute 1. *Hen.* 5. c. 15. but however it may be ſufficient, that being a general law, and concerning the king, the Court would take notice of it.

A plea, that "the *aforeſaid* "*A.* did, &c." admits the identity of *A.*

But the doubt was, whether he had not eſtopped himſelf from taking advantage of that miſtake, by his manner of coming in and aſſigning it, which was, "*et præd.* ROB. FIELDING *dicit*, that he "is the perſon mentioned in the record of the indictment;" whether the "*præd.*" did not admit the addition as in the indictment.

DARNELL, SHOWER and NORTHEY, that it admitted no more than identity of the perſon, and not the truth of the addition; the falſity of which, as well as the omiſſion, is error.

HOLT, *Chief Juſtice*. The true anſwer is, that there could be no eſtoppel; for the outlawry was returned in *Hilary Term*, in the firſt year of *William and Mary*, at which time he ſtood indicted by a wrong addition; but not rendering himſelf until long after, he had no opportunity to plead it, but could only uſe the king's pardon, or ſay "he was not the ſame perſon mentioned in the indict-"ment," eſpecially it being confeſſed by the king's attorney general.

Caſe 331.

Saunders *againſt* Owen.

Cuſtos rotulorum may by parol, without deed, appoint a clerk of the peace.

S. C. 5. Mod. 386. S. C. 2. Salk. 467. S. C. 3. Salk. 250. S. C. Carth. 426. S. C. Comb. 317. 1. Ld. Ray. 165. 3. Mod. 150. 147. Noy, 147.

ERROR OF A JUDGMENT in the court of common pleas in an ASSISE of *novel diſſeiſin* brought againſt him by *Owen*, for the office of CLERK OF THE PEACE of the county of *Kent*; in which aſſiſe the plaintiff for title ſet forth, that the office of the clerk of the peace for the county of *Kent* was an antient office, and that the ſtatute of 1. *Will. & Mary*, c. 21. enacts, "that the *cuſtos* "*rotulorum*, or other perſon to whom it belongs to nominate the "clerk of the peace, ſhall appoint one able and ſufficient perſon "reſiding within the county, to be clerk of the peace, for ſo "long time as the ſaid clerk of the peace ſhall well demean him-"ſelf in the ſaid * office;" that on the fifteenth of *July* HENRY *Earl of Winchelſea* appointed him to be clerk of the peace, whereof he was ſeiſed *ut de libero tenemento pro termino vitæ, &c.* until the defendant diſſeiſed him.

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he defendant pleaded *nul tort nul diſſeiſin*; and upon iſſue d,

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SPECIAL VERDICT was found, that the *Earl of Winchelſea cuſtos rotulorum* of the county of *Kent*; that the office of clerk e peace was vacant; that, the twelfth of *July*, *the Earl*, by ng under hand and ſeal, appointed the ſaid *Philip Owen* to be k of the peace *durante bene placito* of the ſaid *Earl*; that after ifteenth of *July*, at the general quarter ſeſſions the ſaid writing ſhewn to the juſtices of peace; that a queſtion aroſe among of the validity of the grant, and they refuſed to admit him; wards, at the ſame ſeſſions held by adjournment at *Canterbury*, e *Earl of Winchelſea*'s orders the ſaid writing was read in t, and then at the ſame ſeſſions, *abſque ulla relatione ad ſcripprad. habita*, the ſaid *Earl* ſpoke *hæc verba ſequentia in his icanis verbis*, "I do nominate and appoint the ſaid *P. Owen* be clerk of the peace according to the act of parliament:" afterwards *Owen* was admitted; then *the Earl* died, and *the l of Rumney* was made *cuſtos rotulorum*, who granted the ſaid e to *Saunders quamdiu ſe bene geſſerit*, &c.

OLT, *Chief Juſtice*, delivered the opinion of THE COURT, ſaid, that in this ſpecial verdict two points are to be con-ed:

IRST, Whether the *cuſtos rotulorum* can by parol, without any , appoint a clerk of the peace.

ECONDLY, If he can do ſo, whether theſe words of the *cuſtos lorum* be a ſufficient appointment and nomination.

We are all agreed, that he may appoint a clerk of the peace by l. But, SECONDLY, that this is not a good appointment by it.

s to the firſt appointment by parol, it is good, for it is but an ution of a power, and not a deriving any intereſt he has in elf. A grant it cannot be, for a grantor ought to have an in-t in himſelf to grant; and the *cuſtos rotulorum* has at moſt n intereſt at will, and the intereſt of a clerk of the peace is a old; and therefore his eſtate for life, being a greater, cannot rived out of his intereſt, which is leſs; and that the clerk of peace has a freehold, and is not removeable on the death or re-al *of the cuſtos* is not now a queſtion; being ſo adjudged here e caſe of *Harcourt v. Fox (a)*, and affirmed in the houſe of s. Now if a man be ſeiſed in fee of a manor, or of a park, he make a bailiff, or a keeper for life, this muſt be by grant by deed, * becauſe it is an intereſt derived out of his inherit-; but this is rather like tenant for life, with a power to make s for three lives; which being in purſuance of a power, there

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Ante, 42. S. C. 1. Show. 426. Comb. 209. S. C. Show. P. C. 158. 16. S. C. 4. Mod. 167. S. C. S. C. Holt, 189. S. C. 1. Ld. Ray. 161.

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is no neceſſity of livery and ſeiſin, becauſe it is only the execution of an authority; but where a man makes ſuch leaſes, by virtue of an intereſt which he has in the land, they are not good without a livery and ſeiſin. So when a man, by virtue of an intereſt which he has, grants an office for life, it muſt of neceſſity be by deed; but if he do it by virtue of an authority only, there needs no deed at all. So if a man deviſe, that his executors ſhall ſell his lands, they may ſell without livery (*a*), becauſe it is done by virtue of a power, and not by way of conveying any intereſt from them. It has been objected, that the *cuſtos rotulorum* does not only appoint and nominate the clerk of the peace, but alſo doth give and grant the ſaid office; becauſe the words of the ſtatute of 37. *Hen.* 8. c. 1. are, "give and grant the ſaid office;" and the ſtatute of 1. *Will. & Mary*, c. 21. being made on the foundation of 37. *Hen.* 8. muſt be conſtrued agreeably thereunto. But ſuppoſe a deed was neceſſary by the ſtatute of 37. *Hen.* 8. yet not ſo by 1. *Will. & Mary*, c. 21. becauſe by 37. *Hen.* 8. the eſtate of the clerk of the peace determined with the intereſt of the *cuſtos rotulorum*, ſo that *the cuſtos* granted no more than he could grant. But now by 1. *Will. & Mary*, c. 21. he grants an intereſt that ſhall continue, though he be removed or die. But notwithſtanding the words "give and grant," a deed was not neceſſary, by the 37. *Hen.* 8. becauſe "give and grant" are general words, and comprehend all manner of diſpoſitions; they are words of ſurrender, releaſe, and alſo of limitation and appointment, *ſecundum ſubjectam materiam*; and in the 37. *Hen.* 8. there are the very words "limit and appoint," which ſhews all their terms to be ſynonymous, and to mean no other than a nomination and appointment. There is not any law requiring a nomination or appointment to be by deed. A nomination by parol is as much an appointment as by deed. A rent aſſigned, in lieu of dower, may be by parol, without deed, though it be a freehold created *de novo*; and though a rent lies in grant, becauſe this is not properly a grant, but an appointment. So, in caſe of partition, if rent be aſſigned for owelty of partition, if there be three parceners, and rent aſſigned to two, if it were a grant they would be jointenants, and the rent would ſurvive; whereas, it being but an appointment, if either of them
* [202] die, the rent ſhall go to the heir of the deceaſed, * and not ſurvive. Where corporations have power by preſcription to nominate a town-clerk, the conſtant practice is never to nominate him under the common ſeal, but only to elect him, yet he has an eſtate for life, and may maintain an aſſiſe for his office. In *London* indeed it is cuſtomary to grant it by deed, but in other corporations not. In *Hunt's Caſe* (*b*) where a cuſtom was alledged, that the LORD ADMIRAL ſhould conſtitute a regiſtry for and during the term of his life, it was adjudged he might nominate without deed.

(*a*) Co. Lit. 113. (*b*) Dyer, 152.

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ut as to THE SECOND POINT, which was not much inſiſted n the common pleas, we are all of opinion, that this is not a l nomination. The finding the *Earl of Winchelſea*'s coming ie ſeſſions was a good inchoation of the nomination; but the ds themſelves are not ſufficient. FIRST, It is not ſaid that he inated him to be clerk of the peace of the county of *Kent*, e is not one word mentioned of any county whatſoever.— ONDLY, The words are, "I appoint him to be clerk of the eace according to the act of parliament;" by the act he is, to nominate the clerk; ſecondly, to deſcribe the manner of execution, by himſelf or ſufficient deputy; thirdly, he is to e the continuation of his office, *quamdiu ſe bene geſſerit*; all e things are to be done. Now when a man is to do three gs together, and he only does part, that is void. Now the ination of clerk of the peace is but one part of his power. IRDLY, It is uncertain what act of parliament he meant, for e are two acts relating to the nomination of the clerks of the ce, *viz.* 37. *Hen.* 8. and 1. *Will. & Mary*, c. 21. the one of mination at will, and the other to a freehold. FOURTHLY, ough it be found that the words were ſpoke without any rela- to the deed, yet, as they are found, it is impoſſible but they t refer to the deed; becauſe the words are, that he appointed ie ſaid *Philip Owen*," and there is no *Philip Owen* mentioned re but in the deed, and in relation thereunto; and if the words r to the deed, it muſt be taken to be a declaration of *the Earl*'s d, that what he had done by the deed was according to the act arliament; but if it muſt be taken not to relate to the deed, as found, then the verdict is inſenſible and repugnant; becauſe e was no *Philip Owen* mentioned before, to which "the ſaid *hilip Owen*" might have relation. Wherefore we are of opinion this nomination is void, and that the judgment ſhould be rſed.

ut this judgment was reverſed in the houſe of lords.

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* Clerk *againſt* Mundall *(a)*. Caſe 332.

DEBITATUS ASSUMPSIT for wares ſold, *non aſſumpſit* pleaded. At the trial there aroſe a queſtion concerning a bill of hange; where HOLT, *Chief Juſtice*, took this difference, that he party to whoſe hands a bill of exchange comes, neglect to ive the money from the acceptor, there he ſhall not reſort to the drawer, becauſe he has relied on the acceptor, the firſt drawer g only chargeable by cuſtom, or contract in law (*b*). But ill, without payment, ſhall never go in ſatisfaction of a precedent , or contract, except it be part of the contract: as if *A.* ſell ds to *B.* and *B.* take a bill in ſatisfaction thereof; there, though

If the party to whoſe hand a bill of exchange comes, neglect to receive it from the acceptor, he ſhall not reſort to the drawer.

S. C. 1. Salk. 124.
S. C. 3. Salk. 68.

S. C. Holt, 114. 7. Mod. 139. Show. 156. 2. Salk. 442. 2. Wilſ. 353.

This caſe was at *Niſi Prius* at Guildhall. (*b*) See Dingwall *v.* Dunſter, Doug. 247.

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this bill be never paid, *A.* is diſcharged, becauſe it is part of h contract that *B.* ſhould take the bill; but otherwiſe a bill of e change ſhall never without payment extinguiſh or ſatisfy a prec dent debt or contract; and if only part of a bill of exchange paid, it ſhall only for that part diſcharge a precedent contract debt.

This caſe was concerning a bill of exchange drawn by one *England*, payable to the defendant, who indorſed it to the plainti ſending it to him for money which he owed him in the way trade; this was in *June* 169, which bill was never paid; and t defendant inſiſted, that ſeeing the plaintiff had not returned the bi but kept it a long time in his hand after it became payable, th therefore it ſhould be as ſo much money paid him.

But HOLT, *Chief Juſtice*, ruled it to be no payment (*a*).

(*a*) See the Bank of England *v.* Newman, poſt. 241. Lambert *v.* Oakes, p 244. Lord *v.* Francis, poſt. 408.

Caſe 333.

The King *againſt* Shaw.

Appeal from juſtices muſt be to the next *general ſeſſions*, and not next *general quarter-ſeſſions*.

S. C. 2. Salk. 482.
S.C. Carth. 455.
S. C. Sett. & Rem. 135.

AN ORDER was made by two juſtices of the peace againſt Sha the reputed father of a baſtard-child; whereupon he appeal to the next *general quarter-ſeſſions* of the peace, after he had n tice; where the order of the two juſtices was diſcharged.

The order of ſeſſions being removed by *certiorari*, it was mov to quaſh it; becauſe by 18. *Eliz.* c. 3. ſ. 2. the appeal muſt be the next *general ſeſſions*; and it may be there have been a *gene ſeſſions* before the next *general quarter-ſeſſions*; as in *London* a *Middleſex* there are four general ſeſſions in the year, beſides t quarter-ſeſſions:

Wherefore the order of ſeſſions was quaſhed (*a*).

(*a*) But the authority of this caſe is denied; for it is a general rule that every intendment ſhall be made in ſupport of an order of juſtices; and therefore if an appeal be made from an order of baſtardy to a *general quarter-ſeſſions*, the court king's bench will not intend that a gen *ſeſſions* intervened between the making the order and the appeal. Rex *v.* Ch cheſter, 3. Term Rep. 496.

MICHAELMAS TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
* * * * * * *

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

* Brinſby *againſt* Gold.

Caſe 334.

INDEBITATUS ASSUMPSIT for horſe-meat. The defendant pleaded an action depending in the ſheriff of *London*'s court for the ſame cauſe; and held no plea; becauſe an action depending in an inferior court is no bar to an action in a ſuperior court for the ſame cauſe *(a)*.

Action pending in an inferior court, no plea in bar to an action in ſuperior court for the ſame cauſe.

(a) See 1. Com. Dig. "Abatement" (H. 24.). 1. Com. Dig. "Action" (K). (L).

Anonymous.

Caſe 335.

HER HOLT, *Chief Juſtice.* An action on eſcape is out of the rule for changing a *venue*.

Memini ſæpius idem audiviſſe à Cur.

Anonymous.

Caſe 336.

HER HOLT, *Chief Juſtice.* The plaintiff is not bound to pray a *tales*, but only to bring in the record for trial; if he do not pray a *tales*, the defendant may.

Who may pray a *tales*.

Caſe 337.

Pullen *againſt* Benſon.

Trinity Term, 10. *Will* 3. *Roll* 102.

Pleading on a ſheriff's bond.
S. C. 2. Salk. 628.
S. C. Holt, 558.
S. C. 1. Ld. Ray. 349.
S. C. Ray. Ent. 384.
Cro Eliz. 439. 443.
1. Leon. 95.
3. Com. Dig. "Pleader" (G. 12, 13).

DEBT ON A SHERIFF'S BOND for appearance, on the twentieth of *November*, in the ninth year of *William the Third*, conditioned, that *William Benſon* ſhould appear in the king's bench *die Lunæ prox. poſt quinden. Martini Mich. nono Will.*

The defendant pleaded the ſtatute of 23. *Hen.* 6. and that the bond was delivered by him on the thirtieth of *November*, in the ninth year of *William the Third*; and that *William Benſon*, at the time of the delivery and making of the bond, was taken and arreſted by the plaintiff, being ſheriff of *Yorkſhire*, by a writ returnable in the king's bench in *Michaelmas Term* laſt paſt; that being ſo in his cuſtody, he took the ſaid bond from him; *et hoc paratus eſt verificare.*

Whereupon the plaintiff demurred; and ſhewed for cauſe, that

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the plea was * double, and wanted a traverſe.

And THE WHOLE COURT held the plea to be ill; becauſe when he pleaded the bond to be *primo deliberat.* the thirtieth of *November*, he ſhould have traverſed, *abſque hoc* that he delivered the twentieth of *November*, according to the caſe of *Green v. Eden* (*a*), for here the date was material; for ſuppoſe the arreſt was before the return of the writ, and after the return of the writ he took an antedated bond, this bond is void; and therefore the date is material, and ought to be traverſed.

The date of a bond is the delivery of it.
Ante, 194. *acc.*

And by HOLT, *Chief Juſtice*, The date of the bond is one thing, and the bearing date another; the date of the bond is the delivery of it.

Wherefore the plaintiff had judgment.

(*a*) Yelv. 138. Cro Jac. 264.— Benjamin *v.* Howell, 1. Will. 11. See alſo Leverly *v.* Pim, 7. Mod. 16. 20. Viner, 342 and 4. Bac. Abr. 79.

Caſe 338.

The King *againſt* Richard Rains.

The ſpiritual court cannot refuſe to grant the probate of a will to an executor, becauſe indigent or inſolvent, or compel him to give ſecurity.
S. C. ante, 136.
S. C. 1. Salk. 299.
S. C. Carth. 457.

MANDAMUS to *Sir Richard Rains*, judge of the prerogative court, to admit *Richard Watts* to prove the will of *Edith Pinfold.*

Sir Richard Rains returned, that *Watts* was named executor, in truſt for three infant children of *John Paine* deceaſed, brother of *Edith Pinfold*; that it appeared, on proof made to him, that the ſaid *Richard Watts* was very poor, and unable to pay his own debts; and that he abſconded himſelf, whereby the infants and other legatees were in danger of loſing their legacies; that in ſuch caſe, by the eccleſiaſtical law, the ſpiritual judge may defer to grant

S. C. 3. Salk. 162. 233. S. C. Holt, 310. S. C. 1. Ld. Ray. 361. S. C. 3. Peer. Wms. 337. Stra. 857. Fitzg. 125. 1. Bar. K. B. 280. 1. Black. Rep. 456. 2. Atk. 126. 3. Atk. 566.

probate

bate until ſuch executor give ſecurity for payment of legacies, that *Watts* refuſed to give ſecurity; for which reaſon he could admit him, but deferred granting the probate.

THE KING *againſt* RICHARD RAINS.

And after divers arguments a *peremptory mandamus* was nted, becauſe the eccleſiaſtical court cannot demand ſecurity. e teſtator is the proper judge of the qualifications of his executor. ſides, an executor has a temporal intereſt, and without probate not ſue. The civil and canon law warrant not any ſuch demand ſecurity; and though there ſeemed to be ſome equity in the caſe, the eccleſiaſtical court is not the proper court for equity here *England.* Wills are of eccleſiaſtical cognizance, but not by ce of the civil or canon law, but as time out of mind allowed and ſived here; and if you enlargo the power of eccleſiaſtical rts, the king's courts may reſtrain you. If a man make a gene- executor, they will ſue him to account in the ſpiritual court, : we will prohibit them; becauſe, by the law of *England*, the ecutor has all the goods of the * teſtator not diſpoſed of: and s has been the reaſon of all prohibitions concerning adminiſtra- s on this account; becauſe, by 31. *Edw.* 3. they are put in the e caſe with executors. Now in this caſe, ſuppoſe an executor ll not give ſecurity, what ſhall become of this will? Can the linary adjudge him to die inteſtate, and grant adminiſtration *n teſtamento annexo?* An executorſhip being an office, it is fit ſhould take an oath for the due execution thereof; but to give collateral ſecurity, to get other men to be bound for him, it is inſt common right.

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Vide poſtea, Hil. 13 *Will.* 3. Blackborough *v.* Davis.

Anonymous.

Caſe 339.

FINE was ſet on ſeveral defendants, whereas the *poſtea* was not returned; whereupon the next day, upon motion, the e for ſetting the fine was diſcharged.

Poſtea muſt be brought in.

Hill *againſt* Vaux.

Caſe 340.

IBEL in the ſpiritual court of *Lincoln* for tithe-milk by a vicar. The defendant alledged a *modus*, and prayed a prohibition. it appearing on the ſuggeſtion, that by this *modus*, during that rt of the year in which the *modus* was payable, it gave the vicar more than a tenth, which by the law he ought to have through whole year, nor in a more advantageous way, the cuſtom was ld void, and a prohibition denied.

A *modus* to pay part of the thing, if the payment is not to be made in a more advantageous manner, is not good.

In the debate of this caſe a queſtion aroſe, whether it would have en a good *modus*, if it had been alledged that the delivery had been the vicarage-houſe; which depended on this queſtion, whether e parſhioner of common right is obliged to deliver his milk-tithes her at the vicarage-houſe or church-porch, as was adjudged in

S. C Carth. 461. S. C. 2. Salk. 656. S. C Hob. 672. S. C. 1 Ld. Ray. 358 S. C 2. Mod. Bunb. 307.

L under the title of Leiceſter *v.* Foy. Latch, 222. Raym. 277. 1. Mod. 229.

HILL *againſt* VAUX.

the equity ſide of the exchequer, in the caſe of *Dod v. Engleton* (*a*).

And HOLT, *Chief Juſtice*, ſaid, that a pariſhioner is not obliged ſo to do of common right, but only to ſet them out; and that therefore, if this had been in the *modus*, it would have made it a good one; and that the caſe of *Dod v. Engleton* was a mere equitable decree, guided by the cuſtom of the neighbouring pariſhes.

(*a*) Raym. 277.

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Caſe 341.

Pool *againſt* Gardner.

If it do not appear on the proceedings that the ſpiritual court has not juriſdiction, no prohibition ſhall go after ſentence.

ON A MOTION for a prohibition, IT WAS HELD, that where it does not appear in *the libel* or proceedings that the cognizance does not belong to the eccleſiaſtical court, * there no prohibition ſhall be granted after ſentence.

But where it does appear in the libel, or other proceedings, that the cognizance does not belong to the ſpiritual court, there, after ſentence, a prohibition ſhall be granted in all caſes except one; which is, where a man is ſued out of the dioceſe, then if he does not take advantage of it before ſentence, he ſhall not have a prohibition for that cauſe afterwards, becauſe, though the cauſe for that reaſon does not belong to that ſpiritual court, yet it belongs to a court of that nature, and not to one of the king's courts.

S.C.Carth. 463. Ante, 132. 135. Bunb. 81. 2. Inſt. 602. 619. 2. Roll. Abr. 318. 1. Salk. 548. 2. Burr. 813. Coup. 424. 1. Term Rep. 3. 532. Dougl. 378. 3. Term Rep 473. 6. Com. Dig. "Prohibition" 342. (D.).

Caſe 342.

Edward Yard *againſt* Ellard.

If a man indebted to a *feme covert* as executrix, promiſe payment to the huſband, the huſband muſt bring action alone.

ACTION UPON THE CASE, wherein the plaintiff declares, that whereas the defendant, on the ſixth of *June*, in the ninth year of *William the Third*, was indebted to the plaintiff and *Suſanna* his wife, as executrix of the teſtament of *S. T.* ſix pounds for arrears of rent due to *S. T.* in his life-time; and ſo being indebted, in conſideration the ſaid plaintiff would give him time to pay the ſame until *Michaelmas* then next following, he promiſed to pay the ſaid ſix pounds to the ſaid plaintiff at the Feaſt of *Michaelmas* then next following; and ſhews, that he gave him time until the then next *Michaelmas*, but that the ſaid defendant has not paid; and avers the life of his wife. And on *non aſſumpſit* pleaded, and verdict for the plaintiff,

S. C. 1. Salk. 117. S.C.Carth. 462. S. C. 1. Ld. Ray. 368. 1. Black. Rep. 803. 3. Wilſ. 277. Cro. Jac. 110. 2. Com. Dig. "Baron and Feme" (W.).

GOLD moved in arreſt of judgment, that this action ſhould have been brought by the *baron* and *feme*, becauſe the debt, which was the foundation of the promiſe, was due to the wife as executrix, and the money, when recovered, would enſue the nature of the debt, and be aſſets.

But

HE WHOLE COURT held the action was well brought by the only, as in the case of *Lea v. Thinne* (a); and it would n ill if it had been brought by the wife, because the wife privy to the contract; but it is a special promise made to ind only, to whom the payment is only to be made; and the on this promise must be only by him in his own right; omise does not alter the debt, because it is not of a higher ut is a sort of collateral security; and the money reco- this promise is no part of the personal estate of the testa- if the husband die, his executor shall have execution but yet, when it is recovered, it is a *devastavit* in the so far as he recovers.

EDWARD YARD *against* ELLARD.

(a) Yelv. 84.

* Savill *against* Roberts. Case 343.

An action on the case lies for maliciously causing a person to be indicted for a riot, of which he was acquitted by verdict.

S. C. 5. Mod. 394. 405. S. C. 1. Salk. 13. S. C. Carth. 416. S. C. 3. Salk. 16. S. C. 1. Ld. Ray. 374. S. C. Ray. Ent. 396. S. C. Holt, 8. 150. 193. 2. Mod. 306. 1. Lev. 53. 1. Saund. 228. 5. Mod. 223. 349. Stra. 144. 691. 1. Bac. Abr. 61, 62. Bull. N. P. 14. 1. Hawk. P. C. c. 72. f. 3. 1. Bl. Rep. 385. Dougl. 214.

ROF A JUDGMENT in an action on the case in the court mmon pleas, wherein the plaintiff *Roberts* declares, that dant, maliciously and wickedly intending to oppress the caused him to be maliciously indicted of a riot; for that vers other persons did stop a way whereby the defendant arry his tithes; on which indictment he appeared, and was l; by which prosecution he was injured in his name, and pences in defending himself. On not guilty pleaded, there rdict for the plaintiff, and eleven pounds damages; and t for the plaintiff; and on this a writ of error brought.

QUESTION was, Whether this action lies for this malicious on, whereby the plaintiff was put to charges and expences; ourt of common pleas were of opinion it did.

Chief Justice, delivered the opinion of the Court, that t ought to be affirmed, that this point, which has been often and of which there had been variety of opinions, might l. In order whereunto, it is necessary to consider what are grounds and reasons of such actions as these; and it does hat there are three sorts of damages, any one of which is to support this action.

r, Damage to his fame, if the matter whereof he be accused ulous.

DLY, To his person, whereby he is imprisoned.

DLY, To his property, whereby he is put to charges and

irst appears from the case of *Barns v. Constantine* (a), is held, that if an indictment for barratry be preferred,

(a) Yelv. 46. Cro. Jac. 32.

SAVILL *againſt* ROBERTS.

though the indictment be erroneous, or found *ignoramus*, yet an action for the party lies, becauſe it contains matter of ſcandal; and this was the caſe of *Sir And. Henly v. Dr. Burſtall* (*a*), where an action upon the caſe was held good for maliciouſly indicting the plaintiff, being a juſtice of peace, for delivering a vagrant out of cuſtody without examination, contrary to law, becauſe it contained matter of ſlander.

SECONDLY, If there be loſs of liberty: This appears from the ſtatute 21. *Edw.* 1. 2. *Inſt.* 562. *Definit. de Conſpirat.* where ſuch are defined to be conſpirators "who cauſe children within age to "appeal men of felony, whereby they are impriſoned or ſore grieved, "&c.;" and it was thought neceſſary by parliament to give the party ſatisfaction for ſuch ſort of * impriſonment; wherefore the ſtatute of *Weſtminſter the Second*, c. 12 enacts, "That the party acquitted "in a malicious appeal ſhall have damages, with reſpect had to the "impriſonment of his body;" but neither of theſe firſt two grounds are in this caſe; wherefore this action muſt be ſupported by the third, that is, putting him to charges.

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But ſee Payne v. Porter, Cro. Jac. 490. and Smith v. Hixon, 2. Stra. 977. Wicks v. Fentham, 4. Term Rep. 248.

THIRDLY, That a man put to anſwer an indictment is put to charges is notorious; and if ſo, it is an injury to his property; and if this injury be occaſioned by a malicious proſecution, it is reaſon and juſtice he ſhould have an action to repair him the injury: though of late days it has been queſtioned, yet it has always been allowed formerly; as the 3. *Edw.* 3. *pl.* 19. 3. *Aſſ. pl.* 13. 11. *Hen.* 7. *pl.* 25, 26. *Fitz. N B.* 116. *Style*, 378. *Atwood v. Monger.* But it may be objected, againſt the authority of the old Books, that thoſe actions were grounded on *a conſpiracy*, which is of an odious nature; and that without conſpiracy they are not maintainable; but to this it is anſwered, that the conſpiracy was nothing in theſe caſes; that was not the ground of theſe actions, but the damage ſuſtained by the party; for if there be never ſo great a conſpiracy to indict a man, yet if nothing be done in purſuance of that conſpiracy, the party can have no action. *The Poulterers Caſe* (*b*), and *Smith v. Cranſhaw* (*c*). Now if a man be proſecuted maliciouſly for a treſpaſs, either with or without a conſpiracy, it is the ſame thing; the trouble and expence is the ſame; and I take it, that whereſoever an action of conſpiracy is maintainable againſt two, there, if it be a malicious proſecution by one, caſe will lie. These actions of conſpiracy, in the old Books, were really but actions on the caſe: but conſpiracy, properly ſo called, does not lie unleſs the party were indicted of a capital crime, *F. N. B.* 115. in which action of conſpiracy, properly ſo called, if it be brought againſt two, and the one found guilty, and the other acquitted, no judgment can be given againſt him who is found guilty. 11. *Hen.* 7. 25, 26. 2. *Inſt.* 562. 1. *Saund.* 229. And no villainous judgment ſhall be given, but where a conſpiracy was ſo

1 Cro. 239.

(*a*) Raym. 180. 1. Vent. 23. 258. S. C. 2. Bulſt. 271. S. C. Lutch. 15.
(*b*) 9. Co. 59. S. C. Moor, 813. 7. S. C. Palm. 315. S. C. Cro. Car.
(*c*) Jones, 93. S. C. 2. Roll. Rep.

take

: away a man's life; and conſpiracy, though nothing be done eupon, is a crime, and puniſhable at the ſuit of the king. :re has been another objection, and that is the opinion of the ges in the caſe of *Sir And. Henly v. Dr. Burſtall (a)*, who, gh they held the action lay in the original caſe, yet alſo held, if a man be indicted of a treſpaſs, or other crime, where there no * ſlander, and thereof be acquitted, no ſuch action as this contrary to 7. *Hen.* 4. 31. But that opinion was not material ıe caſe before them; there was no occaſion for them to ſay it. ſo far I confeſs, If in this caſe of a riot, there had been only a preferred, and the jury had returned an *ignoramus*, no action ld have laid, becauſe the matter is not ſcandalous. The party ɔt impriſoned, neither ſuffers he any damage; for if the jury do find the bill, he is not injured; but if he had been impriſoned, ıction would lie, though the bill had not been found; and ſo in :aſe of ſcandal. Whereas it has been objected, that it will be ıiſchievous conſequence, by ſtopping all proſecutions of this ; and there is no more reaſon in this caſe of a malicious in- nent, than a malicious action; and no man ſhall be reſponſible ıny damages whatſoever for ſuing a writ or proſecuting in cing's courts.

SAVILL *againſt* ROBERTS.

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ut it is to be conſidered, firſt, That there is a great difference ween bringing an action maliciouſly and proſecuting an indict- t maliciouſly; and ſecondly, that the notion that no action lies bringing an action maliciouſly, is not to be taken largely univerſally, but with ſome reſtrictions: for, firſt, If a man g an action, he either claims a right, or complains of an ry; and the law always allows him to take his courſe aw to obtain his right, or be ſatisfied for his injury; and is allowed in all courts (*b*). If a man ſay to another who is at law, and as heir ſeiſed of lands, "You are a baſtard," e words are actionable;" but if he ſay, "You are a baſtard, nd I am heir to the eſtate," the addition of theſe latter words, igh falſe, makes them not actionable, becauſe he claims a right. e law has provided that no man ſhould proſecute without ing pledges; and that was a ſecurity againſt troubleſome ons; then if the plaintiff's ſuit be vexatious and groundleſs, he l be amerced *pro falſo clamore*; and though theſe amerciaments low matters of form, and therefore ſeveral acts of parliament given coſts to the defendants, yet we muſt judge by the reaſon e law, as it ſtood antiently; but in caſe of an indictment, there) proviſion or remedy but by bringing an action; but if it ap- s that the action is brought merely for vexation and oppreſſion, party grieved in ſome caſes ſhall have an action upon the caſe; all not indeed ſay generally, that he falſly and maliciouſly, out probable cauſe, did bring an action, &c. * but if he ſhew pecial matter, whereby it appears to the Court that it was fri- us and vexatious, he ſhall have an action; as in the caſe of

Vide 1. Saund. 132.

Vide 1. Sid. 463.

1. Vent. 86, 87.

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(*a*) Ray. 189. S. C. 1. Vent. 23. (*b*) 4. Co. 16.

Daw

SAVILL *againſt* ROBERTS.

Daw v. Swaine (*a*) and *Skinner v. Gunton* (*b*). There is another caſe where an action of this nature will lie, and that is, where a ſtranger, who is not at all concerned, will excite another to bring an action, whereby he is grieved, an action lies againſt the exciter. There are other caſes where this action is allowed; as *Carlion v. Mills* (*c*), *Norris v. Palmer* (*d*), and *Ruddock v. Sherman* (*e*): but though this action does lie, yet it is an action not to be favoured, and ought not to be maintained without rank and expreſs malice and iniquity. Therefore, if there be no ſcandal or impriſonment, and *ignoramus* found, no action lies, though the matter be falſe; yet if the indictment be fairly proſecuted, no action lies: ſo if the Court has a juriſdiction, though the matter be ſcandalous, yet if there be no malice, no action lies. But in the caſe before us, the verdict has found expreſs malice; and therefore judgment ought to be affirmed.

1. Vent. 23. 25. 86.

(*a*) 1. Sid. 424.
(*b*) 1. Saund. 228.
(*c*) 1. Cro. 291.
(*d*) 2. Mod. 51.
(*e*) 1. Danv. Abr. 209.

Caſe 344.

Anonymous.

Ejectment.

IF NOTICE in ejectment be given to an under-tenant, and he does not acquaint his landlord therewith, but ſuffers judgment to go againſt him, THE COURT, upon motion, will not ſuffer execution to be taken out until the right be tried.

Caſe 345.

Martin *againſt* Gell.

Statute of Additions extends only to proceſs on which outlawry lies.

CASE, by bill for goods ſold, againſt *Francis Gell, Eſq.* who pleaded, that he was not *Francis Gell, Eſq.* but *merchant*. Whereon the plaintiff demurred; and judgment to anſwer over, becauſe the ſtatute of Additions extends only to proceſs whereon outlawry lies, and no outlawry lies on a bill.

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Caſe 346.

Jackſon *againſt* Pigot.

A promiſe by the drawee of a bill of exchange, made after it is due, to pay it *according to its tenor*, is good.

S. C. 1. Salk. 127.
S.C. Carth. 459.
S. C. 1. Ld. Ray. 364.
Dougl. 640.
1. Term Rep. 235.

ASSUMPSIT on a bill of exchange againſt the acceptor, wherein the plaintiff declares, that one *Dunkin of Briſtol*, on the twenty-fifth of *March* 1696, drew a bill of exchange * on the defendant, payable to the plaintiff within a month; that on the fixteenth of *May* 1697, the defendant accepted the bill, and promiſed to pay *ſecundum tenorem et effectum billæ*. On *non aſſumpſit* pleaded, and verdict for the plaintiff,

IT WAS MOVED *in arreſt of judgment*, that the *aſſumpſit* was impoſſible, becauſe made a year after the time of payment of the bill to pay the money according to the bill.

But judgment was given for the plaintiff; for it appearing on the declaration, that the acceptance of the bill was after the day of payment

the *ſecundum tenorem et effectum* muſt be underſtood to bill preſently; but if it had appeared on the declaration acceptance was before the day of payment by the bill, on the evidence, an acceptance after would not have d the action *(a)*.

JACKSON *againſt* PIGOT.

(*a*) See Mitford *v.* Walcott, *acc.* poſt. 410.

ing *againſt* The Inhabitants of St. Leonard, Shoreditch. Caſe 347.

CHURCHWARDENS AND OVERSEERS, and ſome of the bitants of this pariſh made a poor's rate, which was con- two juſtices, in which ſeveral were not taxed for their ſtates (which was erroneous), but the whole lay on the s of the pariſh; on which ſeveral of the inhabitants ap- the ſeſſions; and they ordered, that the ſaid rate ſhould be and a new one made. Accordingly the churchwardens w rate, both on the real and perſonal eſtates; which rate rmed by the two juſtices. But in the new rate there was nequality, the real eſtates being rated in proportion ten re than the perſonal; for which ſeveral of the inhabitants again to the ſeſſions, where another order was made to the ſaid rate.

The ſeſſions may ſet aſide a poor's rate, and make a new one, or order one to be made by the churchwardens, &c.

S. C. Salk. 483. 524. S.C. Carth. 464. S. C. Holt, 508. 573. S. C. Sett. & Rem. 256.

ow theſe two orders of ſeſſions being removed by *certiorari* court, it was moved to quaſh them; becauſe the ſeſſions relieve particular perſons grieved by the rate, and cannot he whole rate.

ER TOTAM CURIAM, Surely the juſtices at ſeſſions, appeal by particular perſons grieved, may, if they ſee t aſide the whole rate; for the ſtatute 43. *Eliz.* c. 2. ſ. 6. if any perſon or perſons find themſelves aggrieved, it ſhall ful for the juſtices of the peace, at their general quarter- s, to take ſuch order therein as to them ſhall be thought ient; and the ſame to conclude and bind all the ſaid ." So that the juſtices have a large power; and in e caſes, either on the firſt rate, where the perſonal eſtates *charged*, or upon the ſecond, where they are *unequally* it is impoſſible for them to give relief, without ſetting aſide e rate; which therefore they may legally do, being im- by the act to take order herein according to their diſcre- virtue of which, as they may ſet aſide the whole rate, ſo make a new rate themſelves, or order the overſeers, churchwardens to make a new one, as was done in this

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efore theſe two orders were confirmed (*a*).

Rex *v.* Alresford Eaſt, 2. Ld. 1. Term Rep. 625. Rex *v.* Cheſhunt, Rex *v.* Sandwich, Dougl. 2. Term Rep. 623. Rex *v.* St. Agnes, 105. Rex *v.* Maldern, 3. Term Rep. 489.

Loveridge

Caſe 348. **Loveridge *againſt* Whitrow.**

Attachment in *London.*

IN THIS CASE it was ruled, that if *A.* bring debt in *London* againſt *B.* and attach goods of *B.* in the hands of *C.* from whoſe poſſeſſion the goods are not removed, and *B.* by *certiorari* bring the cauſe into the king's bench, and put in bail, the attachment is at an end, and *C.* ought to deliver the goods to *B.*; which if he do not do, *B.* may have trover or replevin; but the king's bench will not compel him to deliver them, becauſe he is no party in court; and all things now are as if there never had been an attachment.

Caſe 349. **Hawkins *againſt* Gardner.**

Part of a bill of exchange cannot be aſſigned, ſo as to intitle the indorſee to an action.

S. C. 1. Salk. 65.

S.C. Carth. 466.

S. C. 1. Ld. Ray. 360.

Ante, 72 84.

Co. Lit. 385. a.

2. Wilſ. 262.

CASE ON A BILL OF EXCHANGE, whereby the defendant promiſed to pay to *R. A.* or order four hundred and ſixty pounds, who indorſed forty-four pounds thereof to the plaintiff; who as indorſee brought this action for the ſaid forty-four pounds, part of the ſaid four hundred and ſixty pounds. The defendant pleaded an inſufficient plea, and the plaintiff demurred.

AND IT WAS HELD, that this perſonal contract is entire, and cannot be apportioned and multiplied into ſeveral actions; ſo that if *A.* draw a bill of one hundred pounds payable to *B.* or order, *B.* cannot aſſign fifty pounds thereof, ſo as his aſſignee ſhall have an action for the ſame; and if *B.* himſelf bring an action for part, he muſt acknowledge ſatisfaction for the reſidue.

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Caſe 350. *** Luck *againſt* Goodwin.**

S. C. 2. Salk. 599.

S. C. 1. Ld. Ray. 393.

SCIRE FACIAS. Exception was taken, that whereas it was ſaid, *petit judicium pro miſis et cuſtagiis in hâc parte*, that it ſhould have been *in eâ parte*: but *in hâc parte* was held good (*a*).

(*a*) See Bringar *v.* Allanſon, 1. Ld. Ray. 532. *accord.*

Caſe 351. **Harriſon *againſt* Cage and his Wife.**

Aſſumpſit by a man againſt a woman, in conſideration that he had promiſed to marry her, ſhe promiſed to marry him.

S. C. 5. Mod. 411.

ACTION UPON THE CASE, for that in conſideration he promiſed to marry the wife *dum ſola*, ſhe promiſed to marry him that he frequently offered himſelf to her to marry her, but that ſhe had not married him, but married the defendant. On not guilty and verdict for the plaintiff,

IT WAS MOVED *in arreſt of judgment*, that there was no conſideration; for though an action will lie for a woman againſt a man

S. C 1. Salk. 24. S. C. Carth. 467. S. C. Holt, 456. S. C. 1. Ld. Ray. 386. S. C. Ray. 403. Ante, 97. 101. 121. 1. Roll Abr. 22. 77. 2. Bulſt. 48. 6. Mod. 172. 1. Sid. 3 Lev. 65. 2. Salk. 437. 3. Lac. Abr. 574. 1. Bac. Abr. 285. 1. Com. Dig. 8vo. 208. 211.

non-performance of his promiſe to marry her, yet ſuch an ion will not lie for a man againſt a woman.

HARRISON *againſt* CAGE AND HIS WIFE.

SED TOTA CUR. *contra*; becauſe if the woman's promiſe did bind her, neither could the man's bind him, becauſe otherwiſe e would be no conſideration for the man's promiſe; and a pro- e without a conſideration is void: but where there is a promiſe inſt a promiſe, one promiſe is the conſideration of the other, auſe each may have his action againſt the other for non-per- mance. Whereupon the plaintiff had judgment.

And in this caſe HOLT, *Chief Juſtice*, held, that if a man making a promiſe were incapable to perform by reaſon of conſangui- , &c. it would be there a void promiſe, whereof ſhe might harge herſelf, by giving ſpecial matter in evidence on *non aſſumpſit* (*a*).

(*a*) See Hutton *v.* Manſell, 3. Salk. Fitzg. 175. 275. Lowe *v.* Peers, Holt *v.* Ward, 2. Stra. 937. 4. Burr. 2225.

Moor *againſt* The Manucaptors of Garrett. Caſe 352.

IRE FACIAS AGAINST BAIL, who pleaded, that there was o *capias* againſt the principal. The plaintiff replied, and ſet a *capias prout patet per recordum*. The defendant rejoined, *iel record*. The plaintiff ſurrejoined, that there was ſuch a rd, and prayed a day to bring it in. Whereupon the defendant urred.

On pleading *nul tiel record*, day is given to bring it in.

S. C. 2. Salk. 566.
S. C. Holt, 558.

HOLT, *Chief Juſtice*. This way of pleading is out of the mon courſe. There are two * ways of pleading a record; er by craving *oyer* of the record, and if it is not given it is a re; or he may plead "*nul tiel record*," and then a day is given ring it in; but this ſurrejoinder is a third way, and a new

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ut it was adjudged well enough, and the plaintiff had judg- nt (*a*).

(*a*) See Grant *v.* Burton, *acc.* poſt. 267. and Creamer *v.* Wickett, *cont.* poſt. 1. Term Rep. 150.

Goodwin *againſt* Beakbane. Caſe 353.

WAS ADJUDGED in this caſe, that in a *ſcire facias* it is ſuffi- ient that there be fifteen days incluſive between the *teſte* of the of the firſt *ſcire facias* and the return of the ſecond (*a*).

Scire facias.
S.C. Carth. 468.
S. C. Salk. 599.
S. C. Holt, 759.

Comy. 53. 2. Stra. 1139. Cro. Eliz. 738. Skin. 633. 1. Lutw. 26. 6. Mod. 146. 4. Bac. 522. 2. Black. Rep. 922.

(*a*) See Peale *v.* Watſon, 2. Bl. Rep. 922.

Roſwell

Caſe 354. **Roſwell *againſt* Prior.**

Caſe for ſtopping his light, not ſaid to be an antient houſe, good after verdict; had been ill on demurrer. S. C. poſt. 635.

ACTION UPON THE CASE, wherein the plaintiff declared, that he was poſſeſſed of a certain houſe for a term of years yet to come, wherein were twenty-one windows, whereby the light *inferri conſuevit et debuit* into the houſe; that the defendant erected a building near the ſaid houſe, whereby the light was obſtructed. Verdict for the plaintiff.

S. C. 6. Mod. 116. S. C. 2. Salk. 459. S. C. Comb. 481. S. C. Carth. 454. S. C. Holt, 500. S. C. 1. Ld. Ray. 392. 713. S. C. Lilly, 81. 516.

AND MOVED *in arreſt of judgment*, that there was no preſcription made to the light; and it was not ſo much as ſaid that it was *antiquum meſſuagium*.

But PER CURIAM, Being after verdict, the declaration is good; it muſt be intended that the plaintiff was put to prove it to be antient houſe; and unleſs it had been an antient houſe and light the jury could not have found for the plaintiff. On a demurrer this ſhort way of pleading had not been good.

Caſe 355. **Anonymous.**

Filing a *habeas corpus* is no appearance.

HOLT, *Chief Juſtice*. The filing a writ of *habeas corpus* is not an appearance, but a *procedendo* may go notwithſtanding; but if bail, either common or ſpecial, be put in, then no *procedendo* to go.

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Caſe 356. **Dupays *againſt* Shepherd (*a*).**

A printed proclamation or printed act is good evidence, though not compared with the record.

CASE ON A WAGER concerning the day of the concluſion of the peace; and to prove it to be on the tenth day of *September*, the printed proclamation * was produced.

It was objected, that it ought not to be given in evidence, unleſs it had been examined by the record inrolled in chancery, or proved to have been under the great ſeal.

But by HOLT, *Chief Juſtice*, it was held good notwithſtanding; and that ſuch things as theſe in print are of as public nature as a public act of parliament; and that even a private act of parliament in print, that concerns a whole county, as the act of *Bedford Levels*, may be given in evidence without comparing it with the record (*b*).

(*a*) This caſe was at *niſi prius* at Guildhall, before HOLT, *Chief Juſtice*.

(*b*) See Reg. v. Inhabitants of Glamorganſhire, poſt. 403. Rex v. Pippet, 5. Term Rep. 436.

Vinkeſtine *againſt* Ebden. Caſe 357.

Michaelmas Term, 8. *Will.* 3. *Roll* 45.

TROVER for an anchor, ſails, and cables. On not guilty, a ſpecial verdict found, that the vill of *Newcaſtle* is an antient ; and incorporate time out of mind, known by the name of Mayor and Burgeſſes of *Newcaſtle*;" that within the vill re had been a cuſtom, time out of mind, for the mayor and bur- es, from time to time, to repair the port of the vill; that conſideration thereof, they have uſed to have a toll of fivepence aldron of all coals exported; and that for default of payment have uſed, by their water-bailiffs for the time being, to diſtrain *cunque bona* of the exporter who refuſed to pay the toll, *quæ legem terræ fuerunt diſtringibilia*. Then they find, that the ndant was water-bailiff, conſtituted *debito modo* by the mayor burgeſſes; that the plaintiff loaded ſo many chaldron of s, the duty whereof amounted to ſeven pounds; that the orter refuſed to pay it; and therefore the ſaid anchor, ſails, and les, being part of the tackle of the ſaid ſhip of the plaintiff, the ndant took them as diſtreſs for the toll, &c. And if theſe goods *in tali caſu per legem terræ diſtringibilia*, they find for the de- lant; if not, for the plaintiff.

Goods of a ſhip may be diſtrained for the port-duties of goods ſhipped on board it.

S. C. 5. Mod. 359.
S. C. 1. Salk. 248.
S. C. Carth. 357.
S. C. Holt, 674.
S. C. 1. Ld. Ray. 384.
S. C. Ray. Ent. 217.
1. Sid. 348. 409.
1. Mod. 47. 77. 104.
2. Mod. 99. 102.
1. Vent. 1.
2. Vent. 50.
2. Lev. 96.
3. Lev. 260. 424.
2. Stra. 1228.
1. Bac. Abr. 677.
2. Bac. Abr. 108.
Gilbert's Law of Diſtreſs, 40.

And judgment was given for the defendant; though it was ected, that the preſcription here is for taking goods of one man the offence of another; for it is to take the goods of the ex- ter, which is the owner, and not the maſter of the ſhip; but e the goods are taken from the maſter, and therefore ill.

ded *per* HOLT, *Chief Juſtice*, Though to ſpeak properly, in the of trade, the owner of the goods was the exporter, yet as to duties of the port, the maſter of the ſhip is the exporter, and ſies and diſcharges all ſuch duties; for it would be very unrea- able to force the mayor and burgeſſes to go and find out the erchant who is the owner: and the conſtant uſage is very rea- able; for without ports there would be no navigation, and with- t port duties they could not be repaired; the duty is to be paid the trader, who is to reap the benefit of the port. And though is true, that a horſe cannot be diſtrained for rent in a ſmith's op (*a*), yet there is no ſuch reſtriction where the diſtreſs is for rſonal duties. The duty in this caſe ariſes out of the goods en to be exported; and by their being laden the duty com- nces, and the ſhip becomes chargeable, and *à fortiori* any part

(*a*) But a gentleman's chariot ſtanding a livery-ſtable may be diſtrained for t due by the livery-ſtable-keeper, ncis *v.* Wyatt, 3. Burr. 1498. So a tape-loom may be diſtrained, ton *v.* Falkener, 4. Term Rep. 565. provided the owner or his ſervants are not actually uſing it at the time, Simpſon *v.* Harcourt, 4. Term Rep. 568. So alſo wearing-apparel may be diſtrained for rent, Peake's Caſes, 36.

of

VINKESTINE *againſt* EDEN.

of it. Without doubt, any other goods of the perſon who ought to pay the duty may be diſtrained, as well as thoſe for which the duty is payable.

Therefore judgment was given for the plaintiff.

Caſe 358. Barnes *againſt* Geering.

If a declaration is not delivered by the laſt day of the ſecond Term, the defendant may ſign a *non proſ.* and is not obliged to receive a declaration.

Gilb. C. P. 40.
3. Bulſt. 214.
Cro Jac. 620.
2. Term Rep. 112.
3. Term Rep. 123.
See 1. Tidd's Pract. 223.

BARNES, *an attorney* of the court, brought debt againſt the defendant, but did not deliver a declaration againſt the defendant until after the ſecond Term; but ſome time after, and before the defendant had ſigned a *non proſ.* he delivered him a declaration, which the defendant refuſed to receive, and then ſigned his *non proſ.* and the plaintiff ſigned judgment for want of a plea,

Which was now ſet aſide as irregular; for the courſe of the Court is, that if a declaration be not delivered by the laſt day of the ſecond Term, that is on or before it, ſitting the Court the laſt day, the defendant may ſign a *non proſ.*; and if in ſuch caſe he do not immediately ſign a *non proſ.* though he may afterwards receive a declaration, if he will, yet he is not compellable ſo to do; but he may well refuſe it. By an expreſs clauſe in the ſtatute of *Hen.* 8. there ſhall be no coſts againſt an attorney upon nonſuit.

Caſe 359. Robert *againſt* John Villars, *alias* Danvers.

In civil actions, the recognizance is entered into by the bail only, and is no eſtoppel.

FIELDING arreſted the defendant in *aſſumpſit* and *trover.*

The defendant now moved, that he might anſwer without putting in bail, becauſe he was a peer, *viz.* *Earl of Buckingham, Viſcount Purbeck*, and *Baron of Stoke*, and ſo was free from arreſt; that if he ſhould put in bail, it muſt be by the name whereby he is arreſted, which would eſtop him from claiming his peerage.

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SED PER CURIAM, In all civil caſes the bail only enter into the recognizance, and not the * party himſelf, and therefore it would be no eſtoppel to him; that they could not take notice of his peerage otherwiſe than by plea, which could not be until he was in the cuſtody of the marſhal; and therefore being by coercion, it would not prejudice him.

So THE COURT would order nothing, *ſed currat lex.*

But HOLT, *Chief Juſtice*, ſaid, If this had been a criminal caſe, they would diſpenſe with his joining in the recognizance to ſave the eſtoppel; and that in this they would make the plaintiff declare ſpeedily, and not be allowed the uſual time.

The

The King *againſt* Beere. Caſe 360.

INDICTMENT AGAINST HIM, for that he, deſigning to ſubvert the government, did compoſe, make, write, collect, and had in his cuſtody with an intent to publiſh, ſeveral falſe and ſcandalous libels againſt the king, in one of which *continetur, inter alia, juxta tenorem et ad effectum ſequentem*; ſetting out the words themſelves.

Juxta tenorem ſignifies the words themſelves.

S. C. 2. Salk. 417. 646.

On "not guilty" the jury find, that "*quoad ſcriptionem, et collectionem tantum ſeparalium libellorum in indictamento mentionat. ſunt inde culpabilis prout in indictamento ſupponitur*;" and as to all other things mentioned in the indictment "not guilty."

S. C. 3. Salk. 226.
S.C. Carth. 407.
S. C. Holt, 422.
S.C. 1. Ld. Ray. 414.

And after ſeveral exceptions in arreſt of judgment,

Vide 1. Sid. 219. 5. Mod. 163. Dougl. 184. 3. Term Rep. 429. *notis.*

THE COURT delivered their opinions *ſeriatim* that the indictment was ſufficient, and that there was a ſufficient crime found in the verdict to charge the defendant.

HOLT, *Chief Juſtice*. The objection to the indictment is, that the charge is not certain, but only "*juxta tenorem et ad effectum ſequentem.*" Suppoſing it had been "*ad effectum*" only, I ſhould have been of opinion that it had been too uncertain; but "*juxta tenorem*" render it certain enough. *Juxta*, as a prepoſition, ſignifies the ſame as *ſecundum* in the civil law; and ſo it does in the common law, as *juxta formam ſtatuti*. So in the caſe of *Chapman v. Dalton* (*a*). Then ſuppoſe "*ſecundum tenorem*" were the words, "*tenor*" ſignifies the very words, as "*cujus tenor ſequitur in hæc verba.*" In debt on a bond in *the Regiſter*, 169. *b.* in a *certiorari* to remove the tranſcript of a record or fine, the king ſignifies that he is willing to be certified *ſuper tenorem finis*; which proves *tranſcriptum* and *tenorem* to be the ſame; ſo that *juxta tenorem* does here ſignify the very ſame words themſelves, or an exact tranſcript of the very words; and if, on the trial, the words in the libel had not been exactly * the ſame with the words in the indictment, the defendant could not have been found guilty. Then if *juxta tenorem* be certain enough, *ad effectum* cannot make them uncertain, for *utile per inutile non vitiatur*. This indeed is not the antient formal way, but introduced of late years; and the firſt time it was ever debated was in the caſe of *Ford v. Bennet* (*b*), which was a ſpecial action on the caſe, for preferring a ſcandalous petition againſt him to *King Charles the Second*, "*ad tenorem et effectum ſequentem*;" and it was ruled on debate to be certain enough; and the ſame was affirmed afterwards in the exchequer-chamber; and ſince that there have been ſeveral precedents to the ſame purpoſe; as *The King v. Fuller* (*c*).

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(*a*) Plowd. 285. Co. Ent. 116.
(*b*) In the king's bench, in Hilary term, 34. & 35. *Car.* 2. Roll 1154. 1. Ld. Ray. 415.
(*c*) Michaelmas Term, 4. *Will. & Mary*, No. 42. 1. Ld. Ray. 509.—See poſt. 309.

To copy a libel, knowing it to be a libel, for the purpoſe of publication, is an indictable offence.

Moor, 627. 813. 9. Co. 59. 2. Salk. 418. 5. Mod. 167. 15. Viner Abr. 87.

Before I come to the objections againſt the verdict, I ſhall conſider whether it be not criminal to write a libel, though a man be not the compoſer or contriver thereof; and certainly it is a great and heinous offence: A libel conſiſts not in words and ſcandalous matter only, for that is not of itſelf ſufficient, though ſpoken with never ſo much malice; but it is the putting in writing, or procuring to be put in writing; for if the words are not written, he is not guilty of the libel. A libel, as ſuch, is a ſpecific offence; and it is the writing libellous words and ſentences, that makes the offence; and in all caſes, where a man does an act, which act cauſes the thing to be what it is, ſuch a one is to be conſidered and conſtrued the doer of it; and this rule holds as well in great offences as in ſmall. If *A.* contrive treaſonable matter, and dictate it to *B.* and *B.* write it, it is treaſon in *B.* as well as in *A.* If an act of parliament make a felony, as in caſe of rape or ſodomy, and ſay nothing of abettors, if *B.* accompany *A.* while he does the fact, and guards the door, *B.* is guilty of felony as well as *A.* though the ſtatute ſpeaks of the principals only (*a*). So in all lower offences procurers are principals; as if *A.* hold *B.* while *C.* beats him, *A.* is guilty of the battery; and it would be very ſtrange if in this caſe only, he who contributes as much to the doing of a thing, as he that did it, ſhould be innocent. And whereas *Lamb's Caſe (b)* has been objected; that caſe muſt be expounded by the report of the ſame caſe in *Moor (c)*, where it is reported to have been reſolved, that the writer of a libel is, in judgment of law, the contriver; and then *Coke's Caſe*, that he who is convicted of a libel muſt be contriver, procurer, or publiſher, is good law, but otherwiſe not. But * taking it in its reſtrained ſenſe, it will not affect this caſe; for the queſtion was not concerning the writing or making the libel, but about the publication thereof; and they held, that the writing the copy of a libel, as indeed writing the original libel itſelf, is no publication thereof, but only an evidence of a publication; the queſtion there being, not how far the writing the copy of a libel is criminal, but whether the writing a copy be a publication? which indeed it is not; if there has been a publication of it proved, it is evidence that it was by him that had it in his cuſtody.

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But it is not criminal to copy a libel, unleſs it be with intent to circulate the defamation it contains.

Moor, 813.

It has further been objected, that there may be a lawful copy of a libel; as a man may write out a copy of a libel to carry it to a magiſtrate; a ſtudent may take a copy of it at the bar for his inſtructions; all theſe things I own may be lawfully done; but then, where a thing abſtractedly is unlawful in itſelf, there must be ſome other matter to legitimate it, which otherwiſe would be unlawful; and that muſt appear to the Court upon evidence, or then the party will not be convicted; beſides, if a man lawfully take a copy of a libel in a lawful manner, that is no libel, becauſe it is not *ad infamiam* of the party concerned, which every libel is. 3. *Inſt.* 174. is an appoſite caſe; there *John de Northampton* was charged

(*a*) 5. Inſt. 59. (*b*) 9. Co. 59. (*c*) Moor, 813.

' to the making of a libel; it has the ſame ſcandalous matter
and the ſame miſchievous conſequences attending it at firſt;
s by this means perpetuated, and it may come into the hands
er men, and be publiſhed after the death of the copyer; and
i might take copies with impunity, by the ſame reaſon print-
them would be no offence, and then farewel to all govern-

e defendant has had great favour in this verdict; for when a
i produced, written with the proper hand of a man, and the
of it is not known, this puts the * proof on him; and if he
: produce the compoſer, the verdict ſhall be againſt him,
all be as bad as taking one in poſſeſſion of a horſe that is

Vide tamen 1. Vent. 31.

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to THE SECOND OBJECTION againſt the verdict, that this
its to an acquittal, becauſe the defendant being charged with
mpoſing, writing, and making, and being found not guilty
making and compoſing, he is alſo found not guilty of the
g, or otherwiſe the verdict is repugnant and void: As to
may be anſwered, that writing is a making, but it is but
rt of making; making is *the genus*, and contriving com-
and writing are *the ſpecies* of it; then the finding *not guilty*
ut the writing finds him not guilty of any ſpecies of libel
iting; and this notion of libel is as old as the law. Libel-
private man is a moral offence, but when it is againſt the
ment it tends to the deſtruction of it. So it is in the civil
uſt. Inſt. lib. 4. *tit.* 4. *de injuriis*; and I cite this authority
: *Bracton*, *lib.* 3. *c.* 36. *f.* 155. ſeems to have tranſcribed
itence from *Juſtinian*: and therefore judgment ought to be
king.

On an indictment for "*compoſing, writing and making* a libel," a verdict of not guilty as to the *making* and *compoſing*, but guilty of *writing* it, is ſufficient.

2. Salk. 660.

ton and Rokeby, *Juſtices*, were of the ſame opinion as
ſeveral points relating to the indictment and verdict, and
me caſes to prove that the writing a libel without publiſh-
was puniſhable in the ſtar-chamber. *Hob.* 62. 121. 21 c.

Caſe 361.

Clayton *againſt* Kynaſton.

Two deeds made at the ſame time, not having reference to each other, not to be conſtrued defeaſances.
S. C. poſt. 415. 548.
S. C. Salk. 573. 575.
S. C. 3. Salk. 298.
S. C. Holt, 178. 218.
S. C. 1. Ld. Ray. 419.
Cro. Car. 426.
Cro. Jac. 300. 623.
1. Lev. 272.

CLAYTON, executor of *William Winterſhall*, brought covenant againſt *Edward Kynaſton*, and the plaintiff declared on articles of agreement, the tenth of *May* 1676, between *Killigrew*, *Kynaſton* and others the king's players on one part, and *Winterſhall* on the other; wherein "it was jointly and ſeverally "agreed, that if the ſaid *William Winterſhall* ſhould be minded to "leave off acting, and give notice thereof in writing, &c. that he "ſhould have five ſhillings allowed him every acting day, &c. "And if the ſaid *William Winterſhall* ſhould happen to die before "ſuch notice in writing, that then one hundred pounds ſhould be "paid to his executor within ſix months after his death, provided "that ſuch notice ſhould not be given but in an acting week." The plaintiff aſſigns for breach, that *Winterſhall* * after the making of the indenture aforeſaid died at *London*, the ſeventh of *July* 1679, and that the hundred pounds was not paid within the ſix months after his death. The defendant pleaded, that at the time of making of the aforeſaid indenture, another indenture was made between the ſaid *Winterſhall* and *Thomas Killigrew* on the one part, and *Edward Kynaſton* on the other part; whereby "it "was jointly and ſeverally agreed, that if, &c." ſetting out *verbatim* the ſame covenants and agreements as in the former indentures, "the ſaid *Kynaſton* ſhould have a mind to leave off acting, "he ſhould be diſcharged from all debts, ſums of money, con-"tracts and promiſes for the uſe of the ſociety, or concerning the "ſame, &c." And then he ſaith, that two years before the death of *William Winterſhall* he gave notice, according to the covenant, of his intention to leave off acting, and accordingly two years before *Winterſhall*'s death left off acting, whereby he became diſcharged from the ſaid covenant, and from paying the hundred pounds, and prays judgment. And thereon the plaintiff demurred.

* [222]

HOLT, *Chief Juſtice*, delivered the judgment of the Court that the deed pleaded by the defendant was no defeaſance of the deed declared on by the plaintiff, becauſe both the deeds were made at one and the ſame time. It can never be the intention of the parties that they ſhould defeat each other, and one deed has no reference to the other, as in all thoſe caſes that have been conſtrued to be defeaſances; for if *Kynaſton* by deſiſting ſhall be diſcharged of his covenant, *Winterſhall*'s ſecurity would be very much diminiſhed, if not totally deſtroyed, and it may be the ſeveral remedy is alſo: For where two are jointly and ſeverally bound in a bond, a releaſe to one diſcharges the other. But he ſaid he would not give any opinion what the law would be in ſuch caſe, in the caſe of covenant; but that the joint remedy is deſtroyed, is without doubt; and certainly it could never be the intent of the parties that the deed ſhould be void as ſoon as it was made. But if *A.* be obliged to *B.* and then *B.* reciting the obligation covenants to ſave him harmleſs abſolutely or upon contingency, this amounts to

CLAYTON *againſt* KYNASTON.

an abſolute defeaſance in one caſe, and after the contingency happens in the other caſe, to prevent circuity of action; but here is no relation between the two deeds, and the words of the covenant are to be diſcharged and ſaved harmleſs abſolutely, or upon a contingency, &c. before made, or afterwards to be made;" but no mention is made of ſecurity given at the ſame time; beſides that, the intent of the parties was that they ſhould be mutual ſecurities; and therefore one * deed could not be a defeaſance to the other. * [223]

And judgment was given for the plaintiff.

The King *againſt* Gall. Caſe 362.

The 21. *Jac.* 1. c. 4. does not extend to ſubſequent ſtatutes.

HOLT, *Chief Juſtice*, delivered the opinion of ten of the Judges, who met at *Serjeants Inn* upon ſome queſtions upon ſtatute 21. *Jac.* 1. c. 4.

FIRST, That that ſtatute does not extend to any offence newly created by any ſtatute made ſince; ſo that ſubſequent penal ſtatutes are not reſtrained thereby (*a*).

All popular actions and proſecutions on penal ſtatutes before 21. *Jac.* 1. c. 4. muſt be in the county where the fact was committed. S. C. Holt, 363. See 4. Hawk. P. C. ch. 26. page 110 to 115.

SECONDLY, That no action of debt lies on the ſtatute 5. *Eliz.* c. 4. or any penal ſtatute by a common informer in a foreign county, but is taken away by the ſtatute of 21. *Jac.* 1. c. 4. but if the fact was committed in the county where the king's bench ſits, then it may be brought in the king's bench, but not otherwiſe (*b*); and he denied the caſe of *Barnes v. Hughs* (*c*) to be law.

And *per* HOLT, *Chief Juſtice*, ROKEBY and TURTON, *Juſtices*, if a ſubſequent act be made that gives a popular action, you muſt in debt lay it in the proper county; and though the party go out of the county, you may proceed againſt him by outlawry.

(*a*) See Hicks' Caſe, 1. Salk. 372. Shipman *v.* Henbeſt, 4. Term Rep. 109.

(*b*) NOTE, In Michaelmas Term, 1 *Anne*, a judgment was given in the common pleas purſuant to this reſolution on the ſtatute 5. *Eliz.* *Vide ante*, 31. and Hob. 327. *act.*; Salk. 373. Carth. 465. 3. Lev. 71. *cont.*

(*c*) 1. Sid. 400. 1. Vent. 8.

Heylin *againſt* Haſtings. Caſe 363.

A promiſe to an executor in theſe words, "*Prove the debt* "*and I will pay* "*you*," will avoid the ſtatute of Limitations. S. C. 5. Mod. 394. S. C. 1. Ld. Raym. 421. Gilb. L. E. 178. 2. Ld. Ray. 1101. Bull. N. P. 148. 3. Bac. Abr. 517. 548. Dougl. 629. 2. Burr. 1099. 2. Term Rep. 760.

DEBITATUS ASSUMPSIT by an executor, for goods and wares ſold and delivered by his teſtator. The defendant pleaded *non aſſumpſit infra ſex annos*, and the proof on the trial was, that the goods were ſold and delivered above ſix years before the action brought, *viz.* in the year 1686, after which the plaintiff's teſtator died; and in the year 1695, the plaintiff delivered the defendant a bill of the ſaid goods. The defendant denied that he had

HEYLIN *against* HASTINGS.

had them, but ſaid, "Prove it, and I will pay you;" and now on this trial the plaintiff proved that the defendant had the goods.

The queſtion was, Whether this might be given in evidence on this general declaration, and whether this promiſe brought the party out of the ſtatute of Limitations?

A CASE being made and advice had thereon, all the Judges at *Serjeants Inn*, except LECHMERE, as HOLT, *Chief Juſtice*, declared, were of opinion, that this ſpecial promiſe of the defendant amounted to a waiver of the ſtatute of Limitations, and that this matter might well be given in evidence on this general declaration; and that proof of the delivery of the goods was to be made on the trial in this * action, it being no more than if he had ſaid, "If I had the goods, I will pay for them."

* [224]

HOLT, *Chief Juſtice*, likewiſe declared, that all the Judges were of opinion, that a bare *acknowledgment* of the debt does not amount to a new promiſe (*a*); which

ROKEBY, *Juſtice*, compared to the caſe of trover and converſion, where demand and refuſal is evidence of a converſion, but not a converſion itſelf.

(*a*) But it is now ſettled, that an *acknowledgment* of a debt will avoid the ſtatute, Yea *v.* Fouraker, 2. Burr. 1099. although ſuch acknowledgment be not in *direct* terms, Bull. N. P. 149. See alſo 2. Vent. 151. Prec. Chan. 385. Comp. 548. Dougl. 651. and Auſtun *v.* Baker, poſt. 250. *notis.*

Caſe 364.

The King *againſt* Duncomb.

Amendment.

THE ATTORNEY-GENERAL moved for leave to amend an information againſt *Duncomb*, wherein the name of a commiſſioner of exciſe was miſtaken; and granted.

A jury cannot be ſtruck by the maſter in capital caſes.

And that THE MASTER might ſtrike a jury by conſent; which was alſo granted, being only a caſe of *miſdemeanor*; but not in *capital caſes*, for then the priſoner would loſe his challenges; and it was never aſked to replead upon mending information. In caſe of miſdemeanor THE CORONER returns forty-eight, but not in capital caſes.

Caſe 365.

Bridget Baily's Caſe.

Service for one entire year tho' by different contracts, is a good ſervice for a year.

S. C. 3. Salk. 257. S. C. Sett. & Rem. 257.

BRIDGET BAILY, before the twenty-fifth of *March* 1695, was a ſettled inhabitant in the pariſh of *Overton* in *Hampſhire*; and then, about the ſaid twenty-fifth of *March*, ſhe contracted with *John Orpwood* of *Steventon*, for twenty ſhillings, to ſerve him from the ſaid twenty-fifth of *March* to the *Michaelmas* following, which ſhe accordingly did; and then ſhe made a new contract with him to ſerve him for a longer time, by virtue of which ſhe ſerved him for a longer time, from *Michaelmas* until the *April* following.

AND

AND IT WAS HELD, that though there was not an entire con- BRIDGET
ict for a twelvemonth, yet there being a ſervice for a twelve- BAILY'S CASE.
onth it gained her a ſettlement, according to the 9. *Will.* 3.
30. (*a*).

(*a*) See Mr. Conſt's Poor Laws, 2. vol. page 415 to 454.

Anonymous. Caſe 365.

' was moved for leave to file an information againſt the mayor Judgment on an
nd common-council of *Hertford* in the name of *Sir Samuel* information in
tree, to know by what warrant they admitted foreigners and nature of a *quo*
ngers to the freedom of the * town, alledging that this was no *warranto* is only
warranto in the name or at the proſecution of the king, but final if againſt
y a method to try a right, whether the mayor and common- the defendant.
ncil could, contrary to the expreſs words of the charter, as it * [225]
eared, admit thoſe to the freedom of the town who were See 9. *Ann.* c.
ngers and not inhabitants therein, and produced four or five 20.
cedents in the time of *King Charles the Firſt.*

And after ſeveral motions THE COURT gave leave to file an in-
nation, becauſe the injured freemen of the town could have no
er way to remedy themſelves, or to try their right.

n this caſe HOLT, *Chief Juſtice*, ſaid, that a *quo warranto* was
he nature of a *writ of right*, to which the defendant can have
plea but to *juſtify* or *diſclaim*, and cannot plead *not guilty*; and
t judgment both for and againſt the king is final. But the
gment in an information in nature of *quo warranto*, if againſt
defendant, is final, but not if againſt the king; and that in
s caſe the right is in the corporation, and the execution only in
mayor and aldermen. *Vide* 1. *Sid.* 86. 9. *Co.* 28. *a.*
Inſt. 282.

Coot *againſt* Lynch. Caſe 367.

UDGMENT was given for the plaintiff in *Ireland*, and coſts On the judg-
were taxed, and error was brought in the king's bench here (*a*), ment affirmed in
l judgment affirmed, and coſts taxed; and afterwards a writ of *B. R.* on writ
or was brought in the parliament here, and the judgment affirm- of error out of
and a *capias* ſued againſt the defendant for all coſts given here. *Ireland*, execu-
tion muſt be by
writ in *Ireland*.

And, after ſeveral arguments and conſideration of the Court, the S. C. 5. Mod.
cution was ſet aſide; for it was ſaid by HOLT, *Chief Juſtice*, 421.
t in this caſe one could not have a *capias* in any county of *Eng-* S. C. Salk. 321.
d becauſe the cauſe of action aroſe in *Ireland*, and there the S. C. Carth.
ue is laid, and therefore the original *capias* ought to iſſue in 460.
S. C. Holt, 372.
. 2. Ld. Ray. 472. S. C. Lilly Ent. 225. 271. Ray. 427. Yelv. 118. Cro. Jac. 535.
c. Abr. 357. Cowp. 535.

(*a*) See 6. *Geo.* 1. c. 5. and 22. *Geo.* 3. c. 53.

COOT *againſt* LYNCH.

Ireland, but no *capias* could iſſue out of the king's bench in *Ireland*, and therefore not here; neither an original *capias*, nor a *teſtatum capias*; but the method is to iſſue out a writ reciting all the proceedings here, directed to the Chief Juſtice of the king's bench in *Ireland*, and there execution ſhall be ſued out for all (for though the judgment be affirmed here, yet the law ſuppoſes the party commorant in *Ireland*), for the coſts are but acceſſory to the judgment; and ſuch mandatory writ determines the writ of error here, and reſtores the cauſe in *Ireland* (*a*).

And it was alſo ſaid by HOLT, *Chief Juſtice*, that it is the true record which comes here out of *Ireland*, and not the tranſcript; * [226] but when it comes here it is the true record, and not * before, and that which is in *Ireland* ceaſes to be a record. And ſo it is of a record of the common pleas that comes hither by writ of error.

(*a*) Poſt Mich. 11. *Will.* 3. Dillon *v.* Walcott, Cro. Car 511. Bp. Offory *contra.*

Caſe 368. The King *againſt* Fell, Keeper of Newgate.

An indictment againſt the keeper of *Newgate* for the eſcape of a perſon in his cuſtody *pro alta proditione*, ill, not ſaying he was committed for it.

S. C. 5. Mod. 414.
S. C. Salk. 272.
5. C. Holt. 779.
S. C. 1. Ld. Ray. 424.
Arte. 75.
6. Mod. 72. 86. 211.
Comb. 114-295.

FELL was indicted for the eſcape of *Berkenhead*, who was committed for high treaſon in conſpiring the death of the king. Upon not guilty pleaded, and verdict againſt the defendant,

IT WAS MOVED *in arreſt of judgment*, that the indictment was only, that *Fell* ſuffered *Berkenhead* to eſcape, being in his cuſtody *pro altâ proditione prædict.* and did not ſhew that he was committed for high treaſon to the cuſtody of the defendant.

And for this exception judgment was arreſted; for it was ſaid by HOLT, *Chief Juſtice*, that he might be in cuſtody for debt, riot, &c. and another might go before a ſecretary of ſtate or juſtice of peace, and ſwear high treaſon againſt him, in that caſe he is in cuſtody of *Fell* charged with high treaſon; but becauſe he was not committed to *Fell* for high treaſon, he ſhall not anſwer for his eſcape as for the eſcape of one committed for high treaſon: the precedents are *cujus ex cauſâ commiſſus fuit.*

ANOTHER OBJECTION was, that it was ſaid, that *Berkenhead* was committed *priſonæ de Newgate ſub cuſtodiâ vic.* whereby it did not appear that he was committed to the cuſtody of *Fell*; and that to ſay he was committed *priſonæ* was inſenſible, for he cannot be committed to a place but to a perſon, &c.

As to the firſt part of the objection, it was held well enough; for if *B.* be committed to the ſheriff, and the gaoler lets him eſcape, the gaoler is liable; and though ſome doubt has been made whether the ſheriff be liable in ſuch caſe,

Yet by HOLT, *Chief Juſtice*, without doubt he is, for by the 14. *Edw.* 3. c. 10. the ſheriff is to put in ſuch keepers for whom he will anſwer; and the 19. *Hen.* 7. c. 10. which reſtores the gaol

gaols to the ſheriff, ſays, that he ſhall be anſwerable for the eſcapes where the gaol belongs to him (*a*).

THE KING *againſt* FELL.

As to the other part of the objection, HOLT, *Chief Juſtice*, ſaid, that "*commiſſus fuit priſonæ*," or "*Turri London.*" was good; and ſo were the precedents.

But for the firſt objection judgment was arreſted.

*[227]

*Another indictment was againſt him for the eſcape of one *Wray*, convicted of a miſdemeanor for attempting to counterfeit exchequer bills (*b*); and after judgment that he ſhould ſtand in the pillory, the ſheriff out of favour delayed the execution beyond the uſual time, and in that time *Wray* eſcaped; and on the indictment, *Fell*, being found guilty, was now in court to be fined.

The ſheriff cannot delay the puniſhment of an offender beyond the uſual time.

HOLT, *Chief Juſtice*. In this caſe the ſheriff ought to be proſecuted and fined grievouſly, for the judgment ought to be executed in convenient time, and the ſheriff's reſpiting it is an affront to the juſtice of the nation; but however that is no excuſe to *Fell*.

If here *Fell* had retaken the malefactor before an indictment found againſt him for the eſcape, he ought not afterwards to be troubled for the eſcape.

If a perſon convicted of a *miſdemeanor* eſcape, and is retaken before the gaoler is indicted for it, he ſhall not be troubled for the eſcape.—*Vide* 3. Co. 52. b. *ſimile*.

And he was fined forty marks.

(*a*) See Sanderſon *v.* Baker, 3. Wilſ. 316. Woodgate *v.* Knatchbull, 2. Term Rep. 148. 156.

(*b*) This is now felony without the benefit of clergy by 9. *Geo.* 1. c. 12. and 25. *Geo.* 3. c. 2. See 2. Hawk. P. C. 7th edit. ch. 51. ſ. 33.

Ward *againſt* Everard. Caſe 369.

Hilary Term 7. *Will.* 3. *Roll* 718.

IN REPLEVIN the defendant avowed as bailiff to *Carina* and *Elizabeth Cromwell*, for that *Sir Robert Carr* was ſeiſed in fee of the place where, &c. and being ſo ſeiſed, granted an annuity or annual rent of one hundred pounds to *Carina*, *Elizabeth*, *Anne*, *Mary*, and *Eſther Cromwell*, during their lives, and the life of the ſurvivor, to be equally divided between them, *viz.* twenty pounds for each of them during their lives, and after the death of the firſt of them, that her part ſhould be equally divided among the ſurvivors; and then follows the ſame limitation, if the ſecond and third die; but when it comes to the two laſt, there is no limitation of the ſurvivorſhip between them. That *Carina* and *Elizabeth* were the two ſurvivors, and for rent arrear, as bailiff to them, the defendant avows, &c. The plaintiff in bar of the avowry pleads, that by an act of parliament all conveyances made by *Sir Carr*, made before *April* 1630, were made void; and that this

"Equally to be "divided" will not make a tenancy in common in a deed, as it does in a will.

S. C. Comb. 329.
S. C. Carth. 340.
S. C. Salk. 390.
S. C. 5. Mod. 25.
S. C. Holt, 368.
S. C. 1. Ld. Ray. 422.
1. Sid. 157.
2. Salk. 423.
Comb. 329. Cowp. 660. 1. Peer Wms. 96. 1. Bro. P. C. 189.

conveyance

WARD *against* EVERARD.

conveyance was ſuch. Upon iſſue joined, a verdict was found for the avowant.

AND IT WAS MOVED *in arreſt of judgment*, that the avowry was ill, becauſe by the grant the grantees were tenants in common of this rent, and therefore could not join in the avowry, but ſhould avow ſeverally.

And it was adjudged PER CURIAM, that they were jointenants; for when *Sir Robert Carr* had granted an annuity to five, the * words "equally to be divided" ſhall not make a tenancy in common in a deed, and the limitation of twenty pounds a-piece is only by way of diſtribution, and not ſevering the grant; and they compared it to *Knight's Caſe (a)*, where it is held, that the rent iſſues out of the entirety, and the "*viz.* ten pounds for one," &c. was only an indication of the ſeveral values and rates of the land demiſed; for when the grantor had granted one rent of one hundred pounds to five, it is repugnant afterwards to make it a ſeveral rent of twenty pounds a-piece; as if one grant two acres to two, *habendum* one acre to one, and the other acre to the other. So a rent granted to two copyholders by a third, of twenty pounds, *viz.* ten pounds to one, and ten pounds to the other, makes it not a tenancy in common (*b*); ſo here a limitation of twenty pounds to each makes it not a tenancy in common (*c*); and if it were a tenancy in common, the avowry of each of them ſhould be *pro quintâ parte* of one hundred pounds, and not for twenty pounds.

* [248]

Quoted in this caſe, 1. In. 189. Litt. f. 208. 2. Roll. Abr. 90. Style, 211. Yelv. 1. Inſt. 180. 1. Cro. 74. Dyer, 361. Cro. Eliz. 25. 1. Saund. 282.

And judgment was given for the avowant.

(*a*) 5. Co. 55. and ſee poſt. Fiſher *v.* Wigg. (*b*) Co. Lit. 169. (*c*) See Hob. 173.

Caſe 270.

The Attorney-General *againſt* Buckley (*a*).

In an information, if, after verdict, the defendant dies before the day in bank, it is a diſcontinuance.

AN INFORMATION in the exchequer by the attorney-general againſt the defendant, and a verdict was given againſt the defendant: after verdict, and before the day in bank, the defendant died;

And the queſtion was, Whether this information was within the ſtatute 17. *Car.* 2. c. 8. which enacts, "that in all actions real and "perſonal, or mixt, the death of either party between verdict and "judgment ſhall not be alledged for error, ſo as ſuch judgment be "entered within two Terms after ſuch verdict?"

And upon ſolemn argument by WARD, POWYS, and HATSELL, (LECHMERE *abſent*) it was held, that an information was not within the word "action," nor the king within the word "party;" and that it was never ſaid "the death," but "the de-"miſe" of the king.

And adjudged that the information ſhould be diſcontinued.

(*a*) In the Court of Exchequer.

Lee

Lee *againſt* Daniel.

Caſe 371.

LT, *Chief Juſtice*, the diſpoſal of ſeats in the mother- belongs to THE ORDINARY, and ſo of ſeats in a chapel nging to the mother-church; and to know whether it or not, is by knowing whether it has *baptiſterium et*

Diſpoſal of ſeats in the church belongs to the ordinary.

Poſtea, 233.

* Anonymous.

Caſe 372.

LT, *Chief Juſtice*. A record of a judgment is defeaſible d or deed.

Defeaſance.

The King *againſt* Lewis.

Caſe 373.

DICTMENT wanted the words "*in com.*" and upon n THE COURT would not amend it, but *ſecus* upon an 1.

Indictment wanting *in com.* not amended.

It is matter of ſubſtance.

Anonymous *(a)*.

Caſe 374.

SE, as TREBY, *Chief Juſtice*, opened it in his argument, I only heard, the reſt having argued before I came, An *aſſumpſit* was brought by an executor, upon a promiſe tor; upon *non aſſumpſit infra ſex annos* pleaded, the plied, that his teſtator took out a writ againſt the de- thin the ſix years, and died during the pleader, making ecutor; and that he brought this writ *per dietas compu-* which the defendant demurred. And he held with his hat this writ did not lie for an executor upon abatement tor's writ; and the nature of this writ is to recontinue rit, with this addition, that it may be amended for falſe he like (*b*). It muſt be the ſame plaintiff that brings it, re it lies not for an executor, adminiſtrator, or heir (*c*). t was of opinion it would not lie; yet there were fre- ſions for executors and heirs to revive their anceſtors, , and yet we find no inſtance of it; and then *Little-* ment will hold, *Jenkenſon, f. 3. pl. 7. 6. Co. 10. 4. Mark Ocle's Caſe. Br. Journeys Accompt*, 33. . 1. *Vent.* 235. It was objected, that there is no caſe act of God or of the law ſhall take away a man's right. are many; before the ſtatute *De Bonis Aſportat.* in all e damages only were to be recovered, the executor was

Journeys Accompts will not lie for the executor, on abatement of the teſtator's writ.

Court of Common Pleas. (*c*) Raſt. Ent. 417. 107. Cro. Eliz. 's Abr. 34. *Edw.* 3. 174.

without

ANONYMOUS.

without remedy; and a pawn is not redeemable after the death of the party that did pawn. *A.* is murdered, and the next heir brings his appeal, and dies, the appeal is gone for ever (*a*). In *Journeys Accompts* you ſhall never change your count; and * the old way of *Journeys Accompts* was to pray a new writ, and then to proceed on the former roll; *dicta* is *iter unius diei* (*b*). If by the cuſtom a copyholder may only make a leaſe for one year, and he is licenſed to make for ninety-nine years; and it was doubted whether he could aſſign his licenſe, or make an under-leaſe; and held he might; becauſe the lord's intereſt was bound for ninety-nine years.

* [230]

(*a*) 27. *Hen.* 6. pl. 64, 65. 14. *Hen.* 6. pl. 7. (*b*) 1. Roll. Abr. 590.

Caſe 375.

Anonymous.

A perſon authorized *to ſell* is impliedly authorized *to receive* the money.

PER HOLT, *Chief Juſtice*. He who has power to ſell, has power to receive the money; for if a man give power to his ſervant to ſell his horſe, he impliedly gives him power to receive the money; and payment to ſuch ſervant is payment to the owner.

Caſe 376.

Bidolph *againſt* Bruce.

Admiralty. 1. Com. Dig. "Admiralty" (E. 15.). 2. Will. 264.

PROHIBITION *niſi* cauſe was granted to the court of admiralty for libelling there for ſeamen's wages; it appearing on the libel, that the ſervice was all in the river *Thames*.

Caſe 377.

Anonymous.

On a *capias*, the ſheriff has no power to receive the money.

HOLT, *Chief Juſtice*. A ſheriff has no power to receive money from the defendant upon a *capias*, for his buſineſs is only to execute his writ; and if, in ſuch caſe, a defendant pay the ſheriff, and he afterwards become inſolvent, and do not pay the plaintiff, ſuch payment ſhall not excuſe the defendant: and if a ſheriff ſuffer one in execution to eſcape, the plaintiff has his election to ſue the ſheriff upon an eſcape, or elſe the defendant: but he cannot have a *capias* againſt the defendant without a *ſcire facias*.

Caſe 378.

Anonymous.

The Court will not diſcontinue an action on a ſuggeſtion of the attorney's abſence.

IT WAS MOVED to diſcontinue a former action pleaded in abatement of a ſubſequent one, upon ſuggeſtion that the attorney in the former action was not to be found.

HOLT, *Chief Juſtice*, would not allow it, but bid them plead *nul tiel record*, and that the defendant would find their attorney for them: and he held, that one could not plead twice in abatement.

Coxeter

* Coxeter *againſt* Parſon. Caſe 379.

Prohibition to ſpiritual court on ſuit there for calling a clergyman "*black-head.*"

S. C. 7. Mod. 31.
S. C. Salk. 692.
S. C. 1. Ld. Ray. 423.
2. Lev. 44.

: was libelled againſt in the ſpiritual court for calling a clergyman "*a blockhead,*" and ſaying that "he wondered a hop would hold his hand over him," and that "he deſerved have his gown pulled about his ears."

id a prohibition was moved for, and 2. *Roll. Abr.* 295, 296. ited.

LT, *Chief Juſtice*, ſaid, he had known a prohibition denied to ſuit for calling a parſon "*a knave (a)*;" but here they t puniſh one in the ſpiritual court for being a blockhead; and l a juſtice of peace "a fool, a blockhead, and a buffle-headed ice," is not actionable.

d a prohibition was granted.

(*a*) Nelſon *v.* The Dean of Chicheſter, ante, 104.

Anonymous. Caſe 380.

Anſwer in chancery filed in the Six Clerks office, evidence.

A TRIAL AT BAR, an anſwer in chancery, though not vorn, was given in evidence; becauſe it was proved to een filed in the Six Clerks office.

Anonymous. Caſe 381.

On a declaration delivered the day before the laſt of the Term, the defendant has two days in next Term to anſwer.

CURIAM. If a declaration be delivered the day before : laſt day of a Term, the defendant has two days in the next to put in an anſwer; for he ought to have four days in

Anonymous. Caſe 382.

In actions on penal ſtatutes common bail ſuffices.

LT, *Chief Juſtice.* In all actions upon a penal ſtatute ommon bail ſuffices; but when a writ is ſpecial, there can- common bail, without ſummoning before a Judge.

Anonymous. Caſe 383.

Scire facias quare executio non.

)N a *ſcire facias quare executio non*, the plaintiff in error ay aſſign error; but if he do not, the judgment is only, that tion be awarded, and not that judgment be affirmed (*a*).

(*a*) See Wicket *v.* Foot, poſt. 241.

Anonymous.

Case 384. Anonymous.

Indictments, some not quashed on motion.

IT was said by SIR SAMUEL ASHTREE, that indictments for perjury, forgery, maintenance, were never quashed on motion (a); but the party is always put to plead to them; but as to riots, or other offences of a public nature, the Court indeed is very tender of quashing them, yet they do it daily, if they find it for a frivolous matter.

(a) Rex v. Fitz, post. 242.

Case 385. * Coot *against* Berty.

In an action of covenant, if *coverture* be pleaded, a replication that it was by means of the husband, is bad.

IN DEBT, the defendant pleaded elopement in the wife: the wife replied, that her husband had bargained and sold her to the adulterer; and licence by husband to wife to lie with another man, cannot be pleaded in bar to an action of trespass by husband; nor that she was a notorious lewd woman; but these matters may be given in mitigation of damages.

Case 386. Anonymous.

No *prosert* in a return to a *mandamus*.

IN THE ARGUMENT of a *mandamus* to a college at *Oxford*, Serjeant WRIGHT said, that upon a return to a *mandamus* they never make a *prosert in cur.*; because the party has never *oyer*, or any plea to make use of it.

Master of college must be named in corporate acts.

SECONDLY, That it is a rule in corporations, *ubi major pars ibi totum*; and that the master must be named in all corporate acts; because without him nothing can be done, but that his vote is included in that of the majority.

Lands given to a college in augmentation of the corporation.

THIRDLY, That if a man by will give lands to a college already founded, with charge to take in more into the corporation; that cannot be but by surrender of the former charter and taking a new one; for corporations cannot be at this day but by charter; before the statute of 13. *Eliz.* they might take a new charter, and that had been a surrender of their old one: but I am afraid they cannot do it without an act of parliament, because it is a kind of alienation; for it is giving a part of the right of the first members away.

Visitation belongs to the founder and his heirs.

2 Inst 68. Eq Cases, 182. Fitz N. B. 42. 2. Roll. Abr. 230.

HOLT, *Chief Justice*. The corporation is by name of "Master, "Fellows, and Scholars;" and they are as it were the common-council of the college; and though the king made the corporation, yet the founder has power to dispose and order it as he thinks fit. And I take this to be altogether a lay corporation, and then the visitation belongs to the founder and his heirs; and if he die with-

Co. Lit 56. 4. Mod. 124. 6. Com. Dig. "Visitor" (A. 3.).

out

: heir, I take the viſitation goes to the king; of which *vide Edw.* 4. *Simon de Monford's Caſe*; and this is my private opi-on; and whether the right of viſitation ſhould eſcheat, was a nt which divided the Court in *Dr. Patrick's Caſe*: and there a great diverſity between abbot and convent, and maſter and lows, and mayor and commonalty, &c. for in * caſe of abbot and nvent, there muſt be the major part, and the abbot beſides; and : reaſon is, becauſe the abbot only acts *cum conſenſu* of the major t of the reſt; but in caſe of maſter and fellows, &c. the maſter nſelf is but part of the acting part, and he is one of the grantors t as the reſt. If it be a donative, and a private corporation, ough it be ſpiritual, I am of opinion the viſitation belongs to : founder, though he do not by expreſs words reſerve it to him-f; for why ſhould it of common right belong to the ordinary? nd whether the king may grant the inheritance of a viſitation, ay be a queſtion; for it may be ſaid to be privy to his perſon; it without doubt he may grant to whom he pleaſes to be viſitor : a time.

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Abbot and convent different from maſter and fellows.

Jacob *againſt* Dallow. Caſe 387.

'UIT was in the ſpiritual court concerning the right of a ſeat in a church; and ſuggeſted for a prohibition, that a right to a ſeat a church was a temporal matter, determinable at common law.

In caſe, for diſturbance of a ſeat in a church, it is ſufficient to lay poſſeſſion.

But PER CURIAM, If you would preſcribe to a right againſt e ordinary, you muſt ſhew a uſage to repair the ſeat; but in an tion on the caſe for diſturbance, you need only lay poſſeſſion ainſt any other diſturber; and of common right the diſpoſal of ts in a parochial church belongs to the ordinary. *May v. Gil-t (a)*, *Boothby v. Baily (b)* was held otherwiſe in this court, in *ixton v. Baker (c)*, upon diverſity between an action upon the e and a prohibition.

S. C. 2. Salk. 551. S. C. 7 Mod 2. S. C. 6. Mod. 230. S. C. 2. Ld. Ray. 755 Ante 228. *ſimile.* 2. Mod. 283.

3. Lev. 74. *Vide* Ray. 52. 1. Lev. 71. 2. Jones, 4. 6. Mod. 436. 1. Burr. 314.

(a) 2. Keb. 150.
(b) Hob. 69.
(c) Buxton *v.* Bateman, 1. Sid. 88.

201. 1. Lev. 71. Ray. 52. 1. Keb. 345. 370. 386. 420. 433. 457.

Spack *againſt* Spicer. Caſe 388.

TRESPASS againſt ten, two of them make default, and the reſt were acquitted by a verdict, which was certified to be againſt idence, and a writ of enquiry of damages againſt the two was ecuted; and a new trial moved for,

New trial refuſed, where writ of enquiry had been executed againſt ſome.

And denied PER CURIAM; becauſe the plaintiff had damages d coſts againſt two.

HOLT, *Chief Juſtice*, ſaid, the jury ought not to be allowed to er the damages; and that in an action againſt twelve, if two of them

Spack *againſt* Spicer.

them make default, and the reſt are acquitted againſt evidence; there ought to be no new trial, becauſe there were coſts once covered. In treſpaſs brought againſt two, if one of them m default, and the other is found guilty, and damages be againſt h

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and then the * other comes in, and a declaration is againſt h with a *ſimul cum*, and damages againſt him too, being found gu and the two *poſtea's* are returned, here the plaintiff may cha *meliorib. damnis*; but here he ſhould have entered a non againſt theſe two; though even ſo, I durſt not warrant him a trial.

Caſe 389.

Anonymous.

Nuſance. Ante, 231, 232.

AN INDICTMENT for common nuſance is never quaſhed u motion.

Caſe 390.

Anonymous.

Pleading.

IF DECLARATION be delivered before the morrow of *All S* the plea muſt be put in before eſſoin-day of next Term.

Caſe 391.

Anonymous.

Seſſions.

PETIT SESSIONS, not ſeſſions for making an order concer the poor.

Caſe 392.

The King *againſt* Camberwell.

The word *declared* ſhall not operate retroſpectively.

BEFORE the ſtatute 4. & 5. *Will. & Mary*, forty days ſer made a ſettlement, and then an act comes and ſays, "b "declared, that no ſervice leſs than a year ſhall make a ſe "ment;" that word "declared" ſhall not make a retroſpec avoid a prior judgment upon the former ſtatute.

Caſe 393.

——— *againſt* Palmer.

If an award be made by Rule of Court, that money ſhould be paid on one ſide, and nothing awarded on the other, the Court will not grant attachment till a releaſe be tendered.

A SUBMISSION TO AWARD was of all matters in contro by Rule of Court; and an award was made, that ſo much m ſhould be paid of one ſide, and nothing was awarded of the other and it was moved to ſet it aſide, as being an award only *ex pa*

HOLT, *Chief Juſtice*. The common exceptions againſ award will not hold here, it being an award, upon ſubmiſſion Rule of Court; for though there be no releaſe awarded of one yet the ſubmiſſion was "of all matters in controverſy;" and Court will not grant an attachment before they tender a rele for if one come to have aid of the Court, he ſhall do that w is fair and equitable before he has it.

R

* Anonymous. Caſe 394.

'T moved to quaſh an indictment taken before juſtices of :e; for that it was only *juſtitiar. ad pacem*, without *con-aſſignat.* Indictment quaſhed. *Vide tamen* 1. Saund. 263.

t was refuſed; for THE COURT ſaid, though it were an :ption, yet they did not like it.

Anonymous. Caſe 395.

T, *Chief Juſtice.* If a writ be returnable this Term, and not come in until the next, it ought to be filed of the vhereof it is returnable. When a writ muſt be filed.

E, The ſame thing was ruled by him in *Michaelmas Term*, ɔurth year of *Queen Anne.*

Clerk *againſt* Butler. Caſe 396.

DEFENDANT "*venit et defendit vim et injuriam quando, &c.*" and then would plead a *miſnomer:* *Miſnomer* not to be pleaded after defence made.

IT WAS SAID, that he could not plead that, or to the ion of the Court, after pleading *defendit vim et injuriam*; he had admitted himſelf by that name. *Brownl.* 203, 204. . 122. *Raſt.* 107. 146.

r *adviſare vult.*

Jenniſon *againſt* Ellis. Caſe 397.

N A WRIT OF ERROR, the want of original was aſſign-, and one was certified varying from the declaration. Original variant. S. C. poſt. 320.

T, *Chief Juſtice*, ſaid; Let the variance be ever ſo great, e it is ſo certified, it ſhall be taken for the original in this

The King *againſt* Moor. Caſe 398.

OR was indicted for ſuffering bone-lace-makers to ſet up ɔeir goods upon ſtalls within his yard, and taking ſo much from them for it. On ſubmitting to a fine, the recognizance entered into for trial to be diſcharged. See Rex v. Patting, poſt. 317.

as ſaid to be a ſetting up of a market, and that a *quo war-*would lie; and by conſequence an indictment for the uſer.

here he pleaded guilty, and ſubmitted to a fine; and here-though he had entered into a recognizance to try it, his izance was diſcharged.

Caſe 399.

Anonymous.

Tithe of rakings of corn.

HOLT, *Chief Juſtice.* One may libel in the ſpiritual court for tithe of rakings of corn, if it never was gathered into ſheaves; but *ſecus* after the corn has been gathered into * ſheaves, and there was no fraud in the gathering; and a prohibition would lie.

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2. Leon. 28. 1. Roll. Rep. 379. 1. Roll. Abr. 645. Moor, 278. 910. Cro. Eliz. 475. 660. 702. 3. Com. Dig. "Diſmes" (H. 1.).

Caſe 400.

Anonymous.

Principal may be ſurrendered without notice, before recognizance forfeited.

HOLT, *Chief Juſtice.* If one ſurrender in diſcharge of bail, before recognizance forfeited, he need not give notice to the plaintiff, but it may be pleaded to the *ſcire facias* againſt the bail; but where a *capias* is gone, and a *non eſt inventus* returned, whereby he forfeits his recognizance, if he would aſk a favour of the Court, he ought to give notice (*a*).

1. Jones, 189. Barnes, 88. 1. Strange, 198. Rep. 401. 2. Strange, 915. Kelly *v.* Medley, Tidd's Pract. 147. Edwin *v.* Allen, 5. Term

(*a*) See Anonymous, poſt. 601.

Caſe 401.

Anonymous.

Demiſe of living.

HOLT, *Chief Juſtice.* It is a *quære* whether a parſon may demiſe all his living; becauſe it may amount to non-reſidence.

Caſe 402.

Anonymous.

Original.

HOLT, *Chief Juſtice.* The *cuſtos brevium*, upon a *certiorari* directed, &c. has no power to certify any original, but ſuch as are of that Term of which the *placita* are.

Caſe 403.

Anonymous.

If a perſon be libelled in the ſpiritual court for two cauſes, one *within*, the other *without* its juriſdiction, a prohibition ſhall not go *after ſentence.*

LIBEL was in the ſpiritual court for calling a woman "whore," and ſaying that "ſhe kept a bawdy-houſe;" and after ſentence a prohibition was moved for;

And urged *contra*, that they ſhould have alledged below, that the words were ſpoken at one and the ſame time, and then they might be prohibited.

But now as they have juriſdiction below for calling a woman "whore," and that was all they gave ſentence for, they would not grant a prohibition (*a*).

(*a*) See the caſe of Grimes *v.* Lovel, poſt. 242. Whitfield *v.* Powel, poſt. 248. See alſo 2. Burr. 813. Cowp. 424. 1. Term Rep. 3. 552. 6. Com. Dig. "Prohibition" (D.).

Lay

Lug *againſt* Lug. Caſe 404.

IT WAS DECREED by the Delegates, of which TREBY, *Chief Juſtice* of the common pleas, was one, that where *A.* had made a will, and by it deviſed all his perſonal eſtate to *B.* and *C.* and afterwards *A.* married *D.* by whom he had ſeveral children, and died, without taking any notice of this will; that this marriage of *A.* with *D.* amounted to a revocation of this will, but that it is only a preſumptive revocation; and therefore if by any expreſſion or other means, it had appeared that the intent of it was, that it ſhould continue in force, the marriage had not been a revocation: and the ſentence given in the ſpiritual court was affirmed (*a*).

Marriage, and the birth of a child, is a preſumptive revocation of a will of perſonal effects.

S.C. 2. Salk. 592.
S. C. 1. Ld. Ray. 441.
2. Vern. 104. 148.
2. Show. 242.

(*a*) See Eyre *v.* Eyre, 1. Peer. Wms. 304. Overbury *v.* Overbury, 2. Show. 242. Wellington *v.* Wellington, 4. Burr. 2165. 1. Bl. Rep. 645. Brady *v.* Cubit, Dougl. 30. Brudnell *v.* Broughton, 2. Atk. 268. Brown *v.* Thompſon, Caſes in Eq. 413. Doe, on the Demiſe of Lancaſhire, *v.* Lancaſhire, 5. Term Rep. 49 to 64. Hodeſen *v.* Lloyd, 2. Brown. C. C. 534. See alſo Ewebank *v.* Hattenwell, 2. Brown. C. C. 220. 514. Lawrance *v.* Wallis, 2. Brown. C. C. 319. Driver *v.* Standing, 2. Wilſ. 88. Chriſtopher *v.* Chriſtopher, 4. Burr. 2171. *notis.* and Wright *v.* Nethierwood, 2. Salk. 6. edit. 593. *notis.*

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* The Biſhop of St. David's *againſt* Lucy. Caſe 405.

LUCY promoted a ſuit *ex officio* before the archbiſhop of *Canterbury*, againſt the biſhop of *St. David's*, upon ſeveral articles for ſimony, and other offences. The biſhop put in his anſwer. Proofs being made for the promoter, the biſhop appealed, upon a *gravamen*, to the Delegates; and, pending the appeal, moved for a prohibition, on ſuggeſtion that the matters contained in the articles were of temporal conuſance.

IT WAS URGED *for a prohibition*,

FIRST, That it did not appear that the biſhop of *St. David's* was cited to appear in any court of which the law took notice, for the citation is to "appear before the archbiſhop of *Canterbury*, or "his vicar general, in his hall at *Lambeth Houſe*, to anſwer, &c." which is not a court of which the law takes notice; for the archbiſhop having the ſame power over his ſuffragans that every biſhop has over the clergy of his dioceſe, and no biſhop can cite any of his clergy before him but in his court; therefore the citation here ought to have been to appear in the arches, or ſome other court of the archbiſhop.

An archbiſhop may exerciſe the juriſdiction he poſſeſſes over his biſhops in what part of the dioceſe he pleaſes; and therefore a citation to appear before himſelf or his vicar general, "at his "HALL at "*Lambeth Houſe*, "&c." is good, although it is not regularly an eccleſiaſtical court.

S. C. 1. Salk. 134.
S.C. 3. Salk. 90.
S. C. Carth. 484.
S. C. 1. Ld. Ray. 447. 539.
S. C. Holt, 651.
1. Bl. Com. 380.

But it was anſwered, that doubtleſs the archbiſhop had juriſdiction over all the clergy within his province; and cited the caſe of *Dr. Wood*, biſhop of *Litchfield* and *Coventry*, 1687, who was ſuſpended by archbiſhop *Sancroft* for dilapidations, and the profits of his biſhoprick were ſequeſtered, and the epiſcopal palace built out of them.

THE BISHOP OF ST. DAVID'S *againſt* LUCY.

HOLT, *Chief Juſtice*, ſaid, that to admit this point of juriſdiction to be diſputed, was to diſpute fundamentals; for the archbiſhop had, without doubt, provincial juriſdiction over his ſuffragan biſhops, which he may exerciſe in what place of his province he pleaſes, for it is not material to be in the arches any more than in any other place; for the arches is only a peculiar conſiſting of twelve pariſhes within *London*, exempt from the biſhop of *London*, and that is properly the arches; and though the provincial and metropolitan juriſdiction be exerciſed there alſo, yet it may be exerciſed elſewhere; for the citation is to appear before the archbiſhop, or his vicar general, who is an officer the law takes notice of; for the vicar general in the province is the ſame as the chancellor in a particular dioceſe; and the dean of the arches is alſo a vicar general of the archbiſhop over all his province, and acts in the arches ſometimes as vicar general, and ſometimes as * dean of the arches.

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An archbiſhop cannot deprive a ſuffragan of a benefice, which lies within the dioceſe of another ſuffragan, for ſimony with reſpect to that benefice.

THEN IT WAS OBJECTED, that the matters contained in the articles were of temporal conuſance.

THE FIRST whereof was, that the biſhop, being incumbent of the rectory of *Burrough Green* in *Cambridgeſhire*, in the dioceſe of *Ely*, covenanted with *William Brooks* for two hundred pounds to make him his curate, and to reſign the rectory to him on requeſt.

And it was argued, that this contract was made as incumbent of *Burrough Green*, and not as biſhop of *St. David's*; and therefore ought to be ſued for in the conſiſtory court of *Ely*, and not *per ſaltum* before the archbiſhop, in caſe this were admitted to be ſimony.

To which it was anſwered, that if the biſhop make a ſimoniacal contract, it is a perſonal offence in him, and againſt the duty of a biſhop, and puniſhable by the metropolitan and eccleſiaſtical cenſures; but if the archbiſhop proceeded againſt the biſhop to deprive him of his benefice of *Burrough Green*, the objection might have held.

And of that opinion was THE WHOLE COURT.

The archbiſhop may puniſh a ſuffragan for *ſimony*, although it is not ſimony within the ſtatute 31. *Eliz.* c. 6.

1. Ld. Ray. 544.
2. Term Rep. 556.
3. Term Rep. 5

THE SECOND was, That there is no matter alledged in this article that amounts to *ſimony*; for the bond to reſign was never executed, and therefore it is not within the ſtatute 31. *Eliz.* c. 6.

And as to THE SECOND OBJECTION it was anſwered, that this is a ſimoniacal contract, and puniſhable by eccleſiaſtical cenſures, and properly ſo before the ſtatute of 31. *Eliz.* c. 6. by ſpiritual law; then if the fact be ſimony, it is conuſable in the ſpiritual court, as it was before the ſtatute; the buying of criſme, or anything *quod ad ſpiritualia pertinet*, is ſimony. But the common law takes no notice of any ſimony but what the ſtatute mentions, which has not defined ſimony in ſuch a manner as to ſay what ſhall be ſimony, and what not, by the ſpiritual law. And if the archbiſhop

THE BISHOP OF ST. DAVID'S *againſt* LUCY.

ıp, &c. ſhall adjudge that to be ſimony which is not ſo, it is cauſe of an appeal, but not of a prohibition;

uod fuit ſimiliter conceſſ. PER CURIAM.

nd HOLT, *Chief Juſtice*, ſaid, that ſimony is ſuch an offence he canon law, as incurs deprivation, and the common law does take notice of it to puniſh it: there is not the word "ſimony" ıe ſtatute of 31. *Eliz.* c. 6. but only "buying and ſelling;" and it ld be very unjuſt, if eccleſiaſtical perſons offend againſt their eſiaſtical duty, in ſuch inſtances as the king's bench cannot notice of, that it ſhould prohibit them to puniſh them according ıeir law. The clergy are obliged to obey laws which laymen not; for a convocation, with conſent of the king, may make ons to bind the clergy, and the diſobeying them is cauſe of deation; and ſo were the canons of 1603, and ſimony was ſined to be (*a*) "*ſtudioſa voluntas emendi aut vendendi ſpiritalia aut ſpiritualibus annexa*;" and a contract might be good ommon law, and yet be ſimony.

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hen THE BISHOP'S COUNSEL urged againſt the article for ng *exceſſive fees* for inſtitution, conferring of orders and proıtions, that theſe were extortions puniſhable by indictment.

A parſon is not intitled to any fee for chriſtenings, burials, &c. except by cuſtom. Lindw. 278.

ut PER CURIAM it was ſaid, that of common right, and by ın law, no parſon could take anything for chriſtenings, burials, ing the ſick, &c. (*b*); but by cuſtom they have been allowed ıke ſomething; and procurations are only ſuable in the ſpiricourt, and a mere ſpiritual duty. For theſe things parſons : obliged to do *ex officio gratis*, and taking money for them was ny, and now taking more than uſage allows will be ſo ſtill (*c*).

HEN IT WAS URGED by Counſel againſt another article, *viz.* he ordained one without adminiſtering the oaths to him; and yet ified under his epiſcopal ſeal that he had taken the oath, which miſhable at common law, by the ſtatute of 1. *Will. & Mary*, ing a breach of that ſtatute.

Where a ſtatute makes a thing a temporal offence, which is puniſhable by the canon law, the ſpiritual court may proceed to deprivation, but cannot puniſh it as a temporal offence.

ut it was anſwered BY THE COURT, that this ſtatute had made it of the office of a biſhop to tender the oaths upon ordination; then the metropolitan may proceed againſt him for doing con- to the duty of his office, but not puniſh him as for a temoffence. So is *Caudrey's Caſe* (*d*), where by ſpecial verdict as found, that *Caudrey* was deprived by the high commiſſioners reaching againſt the common prayer; and though there was anr puniſhment appointed by the ſtatute, and not deprivation until econd offence, yet it was adjudged they might proceed by their er law and deprive him, it being againſt his duty as a miniſter preach. If a clergyman be perjured, &c. after conviction , he may be proceeded againſt below in order to deprivation.

3. Cro. 789. Moor, 779.
12. Mod. 239. Salk. 332.
. Ray. 1588. 3. Bl. Com. 90.
Burdeaux *v.* Lancaſter, 1. Salk. 332. Topſal *v.* Ferrers, Hob. 175. Andrews *v.* Simpſon, 1. Burn. E. L. 249.
(*d*) 5. Co. 1. S. C. Ander. 122. S. C. Poph. 59.

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In *Sir John Savage's Caſe (a)* if the keeper of a gaol ſuffer an eſcape, the king may ſeize upon his office immediately, and it may be felony beſides; but the ſeizure of the office ſhall not be for the felony, but for the neglect.

Other articles were for miſemploying the revenues appropriated to the finding a ſchool-maſter and an uſher, and putting in women in their ſtead.

And for detaining of exemplifications of letters patent, &c. a prohibition was granted; and the rule diſcharged as to all the reſt.

Afterwards the biſhop was deprived, and the ſentence, on appeal, confirmed by the Delegates.

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* NOTE, Here it was held, that by the *Council of Chalcedon* received in *England*, *Can.* 2. and *Council of London*, 810. it is ſimony to take money *pro inſtitutione* or *ordinatione*; and that forging of orders was originally of ſpiritual conuſance, and not by the act of 31. *Eliz.* c. 6: That miſapplying revenue is cauſe of deprivation: That when the act commanded him to tender oaths, and he diſobeys, it is good cauſe of deprivation; as if an act of parliament ſhould deſire the Judges to do ſomething, and they ſhould not obey, it is a forfeiture of their office: And laſtly, that by canon law received in *England*, ſuch as put epiſcopal ſeal to a falſity, or uſe ſuch impreſſion knowingly, *incurrunt pœnam falſarii. Card. Otho. Conſt. f.* 65. *Linwood Prov.*

(a) Keilw. 192. p. 3. S. C. Dyer, 151. p. 4.

Caſe 406.

Wicket and Foot *againſt* Creamer.

Death of one plaintiff in error is no abatement of the writ.

S. C. Salk. 264. S. C. 1. Ld. Ray. 439. S. C. Holt, 274. Ante, 231. Cro. Jac. 256. Salk. 93. Stra. 1095.

DEBT ON A BOND for performance of covenants againſt the defendant, and judgment for the plaintiffs; whereupon the defendant brought error, but put in no bail. *Wicket* died; the ſurviver ſued out two *ſcire facias quare executio non* of the judgment; and on two *nihils* returned, he had an award of execution, and a *capias ad ſatisfaciendum* iſſued; whereupon the plaintiff was taken in execution.

ROBERT EYRE moved to diſcharge him, becauſe the writ of error was a *ſuperſedeas* to the execution, without any bail; it being a bond for performance of covenants, and not for payment of any money; and the death of one plaintiff in error is no abatement of the writ; *quod Curia conceſſit.*

But IT WAS URGED *on the other ſide*, that the execution was good; becauſe the defendant had an opportunity of pleading the writ of error pending, which he not doing could not take advantage of it now.

But

CURIA *contra*; for, two *nihils* being returned, he had no day
l it, but if a *ſcire feci* had been returned it had been other-
nd on that difference an *audita querela* has been often
and diſallowed: and in many caſes, where the defendant
ve an *audita querela*, the Court will relieve on motion;
ie ground of the *audita querela* be a releaſe, or other diſ-
it may be reaſonable to put the defendant to his *audita*
that the plaintiff may deny it, if he think fit. And a
as was in this caſe awarded, *quia erronicè emanavit*: and
aſe the ſurvivor had no occaſion for a *ſcire facias* to revive
ment, for it ſurvived to him.

WICKET AND FOOT *againſt* CREAMER.

* Robertſon *againſt* Moor.

Caſe 407.

ECTMENT; between the firſt day of the aſſizes and the
& the defendant died.

affidavit of this fact, the defendant's Counſel moved to
cution, and ſaid this was not helped by 17. *Car.* 7. and
1. *Sid.* 131. *Hard.* 51. where the like motion had been

Judgment in ejectment, tho' the defendant died between the firſt day of the aſſizes and the verdict.

S. C. Salk. 8. Moor, 469. 1. Burr. 363. Cro. Car. 514. Run Eject. 411. 413. 1. Wilſ. 302.

GOULD, *Juſtice*, ſaid, that he had known it granted, and as
nied.

PER CURIAM, Let things ſtay till notice of motion to
ntiff.

fterwards THE COURT held the judgment well entered.

overnor and Company of the Bank of England *againſt* Newman.

Caſe 408.

AMY gave a bill of exchange payable to *Newman* or
er; *Newman* went and negociated it with THE BANK, at
l rate of intereſt; after this *the Bank* received one thou-
nds of *Bellamy*, and after that demanded the money due on
of a ſervant of *Bellamy*, who did not pay it. Afterwards
failed, and *the Bank* brought an *aſſumpſit* againſt *Newman*
noney; and on general iſſue a verdict for the plaintiff.

a new trial was granted, the verdict being againſt law;
ſoever may be the practice among the bankers, the law
f *a bill* or *a note* be payable to one "or bearer," and he
e the bill, and deliver it for ready money paid to him,
any indorſement on the bill, this is a plain buying of the
of tallies, bank-bills, &c.; but if it be indorſed, there is a
gainſt the indorſor.

OLT, *Chief Juſtice*, laid the rule thus: If a man give
ll for money not due before, *without indorſement*, it is a

If a perſon give caſh for a note or bill payable *to bearer*, without its being *indorſed*, it is *a purchaſe* of ſuch note or bill, and he muſt ſuſtain the loſs if not paid.

S. C. Comy. 57. S. C. 1. Ld. Ray. 442. Ante, 203. Poſtea, 204. Barclay on Bills, 12. 17. 48. Bull. N. P. 277. 2. Stra. 1175.

THE GOVERNOR OF THE BANK OF ENGLAND *againſt* NEWMAN.

ſale of the bill.—And he held, that a demand of a ſervant of the drawer, who uſed to pay money for him, was a good demand (*a*).

(*a*) See Hill *v.* Lewis, Skin. 411. Hob. 117. and The Bank of England *v.* Newman, 1. Ld. Ray. 442. Nicholſon *v.* Sedgwick, 1. Ld. Ray. 180. and the ſtatute 3. & 4. *Ann.* c. 9. ſ. 7.

Caſe 409.

Lawly *againſt* Dibble.

Money brought into court. Ante, 90. 95. 187, 188.

NORTHEY moved to bring money into court upon a covenant, and was refuſed (*a*).

Poſtea, Paſch. 12. *Will.* 3. Farrell's Caſe.

(*a*) But ſee 2 Salk. 596. 1. Wilſ. 75. 2. Burr. 1120. and 8. Mod. 305. 1. Tidd's Practice, 409. Walmouth *v.* Houghton, Barnes, 284. Fulwell *v.* Hall, 2. Black. Rep. 837. and Selw. Practice, 309.

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Caſe 410.

* The King *againſt* Flint.

Indictment uncertain.

S. C. 2. Salk. 687.

S. C. 1. Ld. Ray. 442.

INDICTMENT againſt a baker *quòd ſex collyras*, ANGLICE loaves, *panis triticei debitum pond. minimè contin. et ſex collyras panis domeſtici debitum pondus minimè continen. venditioni expoſuit.* Upon demurrer,

THE FIRST EXCEPTION was, That it did not appear but both the ſix loaves were the ſame, and ſo the defendant would be puniſhed twice for the ſame offence.

An indictment for making bread ſhort weight muſt ſtate the aſſize.

3. Burr. 1697.

THE SECOND, It does not appear what the *debitum pondus* or aſſize of bread was, or how much theſe loaves fell ſhort of it, and ſo too uncertain; for the offence ought to be ſo certain that the defendant might plead it to another indictment, and the Court might meaſure their fine by the nature of the offence.

And judgment for the defendant. *Vide* 5. *Co.* 121.

Ante, 231.

And NOTE, the Court would not quaſh this indictment on motion, becauſe oppreſſive of the poor.

Caſe 411.

Grimes *againſt* Lovel.

Calling a woman "whore and "pock, whore," not ſuable in the ſpiritual court.

S. C. Holt, 593. S. C. 1. Ld. Ray. 486. S. C. Carth. 220. 1. Salk. 696. 2. Term Rep. 473.

LIBEL IN THE SPIRITUAL COURT for theſe words, "You "are a damned bitch, whore, and a pocky whore, and if you "have not the itch, you have the pox."

And moved for a prohibition, becauſe an action lies at common law. And a difference was taken, where the word "pox" could not be intended but of the "*French* pox," by the words that were joined with it; there an action lies.

Vid. 21. 2. Lev. 63. Stra. 823. Bunb. 312. Salk. 652. 3. Lev. 319.

And

id HOLT, *Chief Juſtice*, ſaid, that where the word "pox" joined with the word "whore," it ſhould be intended of "*French* pox."

GRIMES *againſt* LOVEL.

id a prohibition was granted (*a*).

See Anonymous, ante, 236. and ield *v.* Powel, poſt. 248. and

1. Com. Dig "Action for Defamation" (F. 19.).

Gilbert *againſt* The Inhabitants of Puddleſgate.

Caſe 412.

CTION upon the ſtatutes of Hue and Cry (*a*); *not guilty* was pleaded; and a verdict for the plaintiff.

In an action on the ſtatutes of HUE AND CRY it is not neceſſary to lay a *venue* where the examination was taken.

WAS MOVED *in arreſt of judgment*, that no *venue* was laid, e the examination before the juſtice of peace was within ity days, which was traverſable, and not aided by the verdict, ing a penal law.

ut PER CURIAM, This is a remedial and not a penal law; if penal, yet this is well enough; becauſe it is not that which les party to the action, but only the *cauſa ſine quâ non*; but aps it might be fatal on a demurrer.

Bunb. 261. Andr. 25. 1. Com. Dig. "Action" (N. 12.).

See the ſtatute of Wincheſter, *dw.* 1. c. 4. 28. *Edw.* 3. c. 11. ſm. c. 18. and 8. *Geo.* 2. c. 16.

3. Hawk. P. C. 7th edit. page 157 to 160.

* Hilton *againſt* Byron.

Caſe 413.

LTON, a quaker, prayed ſecurity of the peace againſt *Byron*, and offered to make his *declaration* according to the act of parliament (*a*), that he was afraid of his life, &c.

Oath required from a quaker on his demanding ſurety of the peace.

it this being a criminal matter, THE COURT held it to be out e act; and would not grant it, except he would take the oath.

S. C. 3. Salk. 133. 248.

The 7. & 8. *Will.* 3. c. 34. But ſee now 8. *Geo.* 1. c. 6.; and 5. Mod. Stra. 441. 527. 856.

Hart *againſt* Hall.

Caſe 414.

OTION for a prohibition to ſtay a ſuit for tithes of an old mill, *viz.* every tenth toll-diſh (*a*), on ſuggeſtion that it an old mill.

Tithes of a mill. S. C. Holt, 673. 2. Inſt. 621. 3. Com Dig. "Diſmes" (H. 12.).

ut by HOLT, *Chief Juſtice*, The plaintiff ought in his ſug- ion to preſcribe *in non decimando*, and alſo to bring an affidavit le truth of the fact; and ſo it was adjudged in *Lord Chief ice* HALE's time, in the like caſe; for he ſaid, that of common tithes were not due out of a mill; yet before the ſtatute of

See 1. Rell. Abr. 656. 2. Roll. 84. Dodſon *v.* Olivers, Bunb. 673. berlain and Plympton *v.* Newte,

9. Vin. Abr. 40. 1. Brown. P. C. 157. Donalt *v.* Lowther, 2. Bur. K. B. 336.

Articuli

HART *againſt* HALL.

Articuli Cleri (a) ſome mills did pay, and ſome did not, and upon that it was enacted, "that *de molendino de novo erecto. non jacet prohibitio*;" and for ſuch as paid before that ſtatute, they ſhall ſtill pay. And he ſaid, tithes were either predial or perſonal, for the corn paid tithe before; and it is neceſſary to preſcribe in a non *decimando* in an old mill; and he quoted the caſe of *Hughs* v. *Hertford (b)*.

(a) 9. *Edw.* 2. c. 5. (b)

Caſe 415.

Anonymous.

No prohibition to the admiralty for refuſing copy of a libel.

HOLT, *Chief Juſtice*, refuſed to grant *a prohibition* to the admiralty for refuſing to give a copy of the libel; becauſe the ſtatute 2. *Hen.* 5. c. 3. extends only to the eccleſiaſtical court, and not to the court of admiralty (*a*).

(*a*) See alſo 2. & 3. *Edw.* 6. c. 13. and 1. Com. Dig. "Prohibition" (F. 15.)

[ICHAELMAS TERM,

The Tenth of William the Third,

AT

The Guildhall,

BEFORE

Sir John Holt, *Knt. Chief Juſtice.*

The King *againſt* Cole.

Caſe 416.

THE DEFENDANT was indicted, for that he, being a bankrupt, and brought before the commiſſioners, refuſed to give them an account of his effects. And his ce at the trial, upon not guilty pleaded, was, that he was an at the time of the debts contracted, and therefore could not ankrupt.

Infant cannot be a bankrupt. S. C. Holt, 360. S. C. 1. Ld. Ray. 443. 1. Atk. 146. Rep. Temp. King, 46. Bull. N. P. 38.

d of that opinion was HOLT, *Chief Juſtice*; for though the of an infant are only voidable at his election, yet no one e a bankrupt for debts he is not obliged to pay.

herefore the defendant was acquitted (*a*).

See Ex parte Meyot, Bull. N. P. 38. Ex parte Sidebottom, 1. Atk. 46.

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* Lambert *againſt* Oakes.

Caſe 417.

REW *a bill* (*a*) payable to *Oakes* or order: *Oakes* indorſes it to *Lambert*; and *Lambert* brings an action for the money *Oakes*.

Note of hand to be demanded of the drawer before the indorſee liable. S. C. Holt, 118. S. C. 1. Ld. Ray. 443.

d by HOLT, *Chief Juſtice*, it was ſaid, that he ought to that he had demanded or endeavoured to demand his money before he could ſue *Oakes* on the indorſement (*b*); ſo if the bill

e was a note of hand. See Kyd 169, 170.

e is now very fully ſettled, that ion againſt the *indorſer of a bill* it ceſſary to prove an application to er for payment, Bromley *v.* Frazier, Stra. 441. Lawrance *v.* Jacob, Stra. 515. Lake *v.* Hayes, 1. Atk. 282. Heylin *v.* Adamſon, 2. Burr. 669. But on *a note* ſuch a demand muſt be made. See Kyd on Bills, 169.

was

LAMBERT *againſt* OAKES.

was drawn on any other perſon, payable to *Oakes* or order, the demand, to intitle *Lambert* to his action, ought to be after the indorſement.

An indorſee may bring an action on a blank indorſement. Ante, 241.

SECONDLY, *Oakes* indorſed this bill blank to *Lambert* by writing his name only; and therefore it was urged, that this was a ſale of the bill, and the indorſement could not ſubject the indorſor to an action.

Dougl. 611.617. Kyd on Bills, 89. 2. Burr. 1222. Bailey on Bills, 13.

But by HOLT, *Chief Juſtice*, The indorſement, though upon diſcount, will ſubject the indorſor to an action; becauſe it is a conditional warranty of the bill, and makes a new contract, in caſe the perſon on whom it was drawn do not pay (*a*).

A blank indorſement ſubjects the party to whatever may be ſuperſcribed. Ante, 193. Bailey, 28.

THIRDLY, by HOLT, *Chief Juſtice*, If a man indorſe a bill blank to *B.* he puts it in the power of *B.* to ſuperſcribe what *B.* pleaſes (*b*).

Indorſee not liable unleſs the money is demanded in time.

FOURTHLY, If the indorſee do not demand the money payable by the bill, on the perſon on whom it is drawn, in a convenient time, and afterwards he fails, the indorſor is not liable (*c*).

An indorſor liable though the note is forged.

FIFTHLY, If the action be brought againſt *the indorſor*, it is not neceſſary to prove the hand of *the drawer*; for though it be forged, the indorſor is liable (*d*).

(*a*) See Bailey on Bills, 17.

(*b*) See Ruſſell *v.* Langſtaffe, Dougl. 514. in point.

(*c*) See Danack *v.* Savage, 1. Show. 155. Manwaring *v.* Harriſon, 1. Stra. 508. Eaſt India Company *v.* Chitty, 2. Stra. 1175. Hankey *v.* Trotman, Black. Rep. 1. Chamberlain *v.* De la Rive, 2. Wilſ. 353. Appleton Sweetapple, Bailey, App. No. 6. Tidd *v.* Brown, 1. Term Rep. 167.

(*d*) See Anonymous, poſt. Jennys *v.* Fowler, Stra. 946. Price Neale, 3. Burr. 1354. Collins *v.* Emmet 1. H. Bl. Rep. 313 See alſo Kyd Bills, 203. &c.

Caſe 418.

Tod *againſt* Stokes.

A huſband is not liable to debts contracted by his wife after notorious ſeparation, and maintenance allowed her.

S. C. Salk. 116. S. C. Holt, 100. S. C. 1. Ld. Ray. 444.

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6. Mod. 147. Stra. 875. 1214. 1. Bac. Abr. 295.

THE PLAINTIFF, an apothecary, ſued the defendant, a parſon living in *Chicheſter*, for phyſic adminiſtered to his wife in *London*.

On *non aſſumpſit* pleaded, it appeared, on evidence, that the defendant and his wife had been parted by conſent for five years laſt paſt, and that on ſeparation, by articles to truſtees of the wife's naming, the defendant had obliged himſelf to allow the wife twenty pounds a-year; which he did accordingly, and had a covenant from the truſtees to exonerate him of all the charges of the wife; and that the plaintiff did not know the wife to be a *ſole* * *covert* at the time of the medicines given.

And by HOLT, *Chief Juſtice*, theſe points were held:

FIRST, That the reaſon why the huſband ſhall pay debts contracted by the wife is upon the credit the law gives her by implication

on, in reſpect of cohabitation; and is like credit given to a ant (*a*).

Top *againſt* Stokes.

ECONDLY, That if huſband and wife part by conſent, and the band ſecure her an allowance, it is in conſideration that he uld not be charged any more by her; and it is unreaſonable he uld be charged for victuals, or phyſic, or other neceſſaries r (*b*).

THIRDLY, That a perſonal knowledge of ſuch agreement is neceſſary, ſo it be publicly and notoriouſly known (*c*).

FOURTHLY, That ſuch public knowledge of the agreement d not be at *London*, where the debt is contracted, but is ſuffi- nt if it be where the parties lived, *viz.* in this caſe at *Chicheſ-* (*d*).

FIFTHLY, That if the debt were contracted by the wife in ſo ort a time after the agreement, as it could not be known at *Chi- eſter*, in that caſe the huſband would be liable (*e*).

SIXTHLY, If a huſband turn away his wife, he muſt ſend credit th her for reaſonable expences (*f*).

SEVENTHLY, If a wife go away without conſent of her huſ- d, ſhe ſhall find credit where ſhe goes, without any charge to huſband, or his giving any perſonal notice of leaving him. l he ſaid the caſe of *Scot v. Manby* (*g*) had been carried too far his; and he remembered a caſe before him at *Exeter* aſſizes, *gworthy v. Huckmore* (*h*), where he held, that if a wife elope a her huſband, and take up neceſſaries from a tradeſman, who no notice of the elopement, the huſband ſhould not be liable; it is ſufficient for the huſband to give general notice that eſmen, &c. ſhould not truſt his wife.

ut SERJEANT WRIGHT, now lord keeper, at the ſame time ainted his lordſhip, that TREBY, *Chief Juſtice* of the com- n pleas, had ruled that point otherwiſe in an action between the e parties (*i*).

To which HOLT, *Chief Juſtice*, ſaid, that notwithſtanding he ld adhere to his opinion in all the points aforeſaid.

And the plaintiff was nonſuited (*k*).

(*a*) See 2. Lev. 16.
(*b*) Ferrers *v.* Ferrers, 1 Vern. 71. [illegible] *v.* Angies, Prec. in Chan. 499. [illegible] *v.* Scott, Allen, 61. Craig *v.* [illegible], 6. Mod. 147. Corbet *v.* [illegible], 1. Term Rep. 9. Compton [illegible]inſon, 1. H. Bl. Rep. 364. [illegible] C. C. 377. Ellah *v.* Leigh, [illegible] Rep. 682.
(*c*) See Craig *v.* Bowman, 6. Mod. [illegible]
(*d*) Angies *v.* Angies, Gilb. E. R. 153.
(*e*) Etherington *v.* Parrott, 1. Salk. 118. Thompſon *v.* Harvey, 4. Burr. 2177.
(*f*) Sid. 109. 2. Lev. 4.
(*g*) 10. *Will.* 3.
(*h*) See Car *v.* King, poſt. 372.
(*i*) See upon the ſubject of a huſband's liability to pay debts contracted by his wife, Mr. Evans's note to Etherington *v.* Parrott, 1. Salk. 6th edit. 118. Mr. Nolan's note to the caſe of Bolton *v.* Prentice, 2. Strange, 3d edit. 1214. and the notes to the caſe of Manby *v.* Scott, 1. Mod 124.

Turner

Caſe 419.

Turner *againſt* Brent.

An action lies againſt a perſon for knowingly ſelling goods to which he has no title.—Cro. Jac. 4. 471. 1. Salk. 282. Moor, 126. Allen, 91.

A SELLS GOODS to *B.* to which he has no title; if *A.* know that he has no good title to them, an action lies against him for the deceit, if the owner recover them againſt *B.* but ſo if *A.* do not know but his title to them is good.

a

MICHAELM

MICHAELMAS TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
* * * * * * *

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Rigdon *againſt* Hedges, Judge of the Admiralty. Caſe 420.

GOODS were arreſted in the river *Thames* by proceſs of THE COURT OF ADMIRALTY, and a reſcue made, and a warrant againſt *Rigdon* for a contempt of their proceſs.

nd in a motion for a prohibition it was ſuggeſted, that the ori- proceſs was of a thing out of their juriſdiction, and therefore : could be no contempt.

contra, it was urged that this ſuggeſtion came too ſoon, becauſe nnot be known whether they have juriſdiction or not, until ne put in to the action; and ſo in the eccleſiaſtical or inferior ts, if a prohibition be ſued on a ſuggeſtion, that the cauſe of n is out of their juriſdiction (*a*). So in the caſe of *a modus* for s, you muſt ſuggeſt that you pleaded it below: and ſo on pro- ing below for words: and without doubt they might have a liction: and their way had been to move for a prohibition im- ately, or to put in bail, and then to move upon the libel: and court that has a juriſdiction may puniſh for contempt of proceſs; and here the Court will give them the credit that do right, until the contrary appears.

If goods be arreſted in the river *Thames* by proceſs from the admiralty, and reſcued, the court of admiralty may grant a warrant againſt the reſcuer for a contempt of the proceſs; but it ſhould appear by the proceſs that they had juriſdiction, and therefore if it only ſay "*in* "*cauſâ mariti-* "*mâ*," the party may plead it below, and if the plea be refuſed a *prohibition* lies.

(*a*) 1. Vent. 180. 1. Mod. 81.

HOLT,

RIGDON *againſt* HEDGES, JUDGE OF THE ADMIRALTY.

HOLT, *Chief Juſtice.* Surely the cauſe that brings it t their juriſdiction ought to be ſet forth in their proceſs; an too general to ſay "*in cauſâ maritimâ.*" If goods be taken by pirates, and ſold by them at ſea, and brought to ſhore, *or not prize*, ſhall be tried in the court of admiralty. 2. S 260. *Ray.* 189. 2. *Mod.* 237.

They would not grant a prohibition without affidavit tha had pleaded the matter below.

And it was ſaid, that the uſage is by warrant to ſeize the ſ which, upon bail, are delivered back, and then a libel is giv

But CURIA, Let a prohibition go, and declare *inſtanter*, will hear Civilians next Term.

A ſhip arreſted within the juriſdiction of the admiralty and reſcued, may be reſeized anywhere.

And here PER CURIAM, If a ſhip be arreſted by wan THE COURT OF ADMIRALTY within their juriſdiction, and wards is reſcued, they may reſeize her out of their juriſd and no prohibition lies.

Caſe 421.

Hyde *againſt* S———.

The death of the huſband in treſpaſs againſt huſband and wife. S. C. Holt, 101. Kely. 31. *contra.*

TRESPASS againſt huſband and wife; the huſband died

SIR FRANCIS WINNINGTON moved it in arreſt of ment.

Sed non allocatur; for a wife may commit treſpaſs alon her huſband, and alſo felony, if it be not by coercion * huſband.

* [247]

Trover againſt huſband and wife *ad uſum ipſorum.*

HOLT, *Chief Juſtice.* Though in a declaration in againſt huſband and wife, laying the converſion *ad uſum i* judgment was arreſted, yet if it come in queſtion again, i not be ſo by my conſent.

Caſe 422.

Bully *againſt* Palmer.

A new charter granted in conſideration of the ſurrender of an old charter, which ſurrender was not enrolled, is void. S. C. Salk. 190. Poſt. 253. Stra. 314. 1. Burr. 131. 3. Burr. 1327.

THE PLAINTIFF brought an action on the caſe for a falſe to *a mandamus*, commanding him to ſwear *Harris* mayor of the town of *Dartmouth.*

And a *peremptory mandamus* was moved for.

IT WAS RESOLVED by the Court, that if there be an ol ter ſurrendered, but the ſurrender is not enrolled, and charter in conſideration of the ſurrender granted, that the charter is void; and if there be any other perſons in the new ter than were in the old, any law made by them is void, b they act under a void charter: But *ſecus*, if it be the ſame bers in the old charter, becauſe then they act by their firſt c which is ſtill good. So if in the firſt caſe they had given a

the ſeal of the new corporation to it, it would be void, as idged in the caſe of *Bath and Wells*. But if the mem- he old charter had gone to election, and ſome, by colour ew charter, had voted with them againſt their will, there by majority of the old charter with ſome mentioned in is good. BULLY *againſt* PALMER.

Johnſon *againſt* Nayler. Caſe 423.

A WRIT OF EXECUTION bearing *teſte* in Vacation, and s moved to have it amended; and the caſe of *Smith v.* *l*, in new *Jones*, 41. and *Dyer*, 129. were cited; but URT would not grant the motion. Writ of execution not amended.

Anonymous. Caſe 424.

URIAM. If in caſe where the king's revenue or right ncerned, though there be evidence *pro* and *con*. yet if it ſt the ſtrength of evidence, it is fit for a new trial. New Trial. 2. Stra. 1106. 1142.

1. Wilſ. 22. 1 Burr. Rep. 12. 54. 2. Burr. 665. 936. 1. Black. 1. 3. Wilſ. 39.

Anonymous. Caſe 425.

COURT. If an attorney of the Court, upon motion, his name ſtruck out of THE ROLL, he ſhall never after ged to act as an attorney (*a*). Attorney.

Kidwell's Caſe, B. R. H. Notes, 42, 43. *Ex parte* Cole, Dougl. John Moody's Caſe, Barnes' 113, 114. *contra*.

Anonymous. Caſe 426.

COURT. If *a reſcous* be returned, an attachment ſhall of courſe without motion. Attachment. Cro. Jac. 419.

8. 1. Roll. Rep. 388. 440. 3. Lev. 46. Cro. Eliz. 888. Gilb. P. C. 83. 2. Stra. 435. 14. Tidd's Pract. 771.

* Anonymous. Caſe 427.

E was granted to file AN INFORMATION againſt ſeveral e-button makers, for combining, by covenants, not to ſell ſet rate. Information for combining not to ſell under a ſet price.

, *Chief Juſtice*, It is fit that all confederacies, by thoſe of to raiſe their rates, ſhould be ſuppreſſed. 4. Hawk. P. C. 7th edit. 85. 90, 91.

Baker *againſt* Chandler. Caſe 428.

MENT AND EXECUTION thereupon were ſet aſide, for the plea was put in before the judgment ſigned. Judgment for want of a plea.

Tidd's Pract. 309. 4. Term Rep. 370. 5. Term Rep. 152.

Caſe 429.

Whitfield *againſt* Powel.

Prohibition.
3. Cro. 314.
1 Ld. Ray. 508.
4. Com. Dig. "Prohibition" 507.

PROHIBITION granted to the ſpiritual court to ſtay a ſuit there for calling a woman "a pocky whore (*a*)."

(*a*) See Anonymous, ante, 236. and Grimes *v.* Lovel, ante, 241.

Caſe 430.

Broom *againſt* Holford.

Amendment.

ACTION upon A PENAL STATUTE, and the ſum miſtaken in the declaration, and leave given to amend it, the writ being general.

Caſe 431.

Rowe *againſt* Nedham.

Satisfaction.

PER CURIAM. Judgment a good plea in ſatisfaction of a bond.

Caſe 432.

Shales *againſt* Scignoret.

Covenant to pay on aſſigning of *Bank* ſtock; tender of tranſfer ſhould be the breach aſſigned.

S.C. 1. Ld. Ray. 440.
S. C. 1. Lutw. 516.

THE DEFENDANT covenanted with the plaintiff that he would pay him one hundred pounds in money, and give him credit for one hundred pounds more, upon the plaintiff's aſſigning him one thouſand pounds ſtock in the *Bank of England*; and that the defendant would accept the ſame, upon notice, on or before the twenty-fourth of *May* next following.

In covenant, the plaintiff alledged notice to the defendant that the plaintiff would be ready to make the tranſfer on the ſaid twenty-fourth of *May*, but that the defendant did not come to accept; and non-payment of money aſſigned for breach, &c.

* [249]

And PER CURIAM, The breach is ill aſſigned, for they ſhould aſſign for breach that they had tendered a tranſfer, * and that the defendant did not accept, for there was nothing to be paid but after tranſfer.

Caſe 433.

Anonymous.

A ſtatute concerning revenue is public.

HOLT, *Chief Juſtice*. An act of parliament concerning the revenue of the king is a public law; but it may be private in reſpect to ſome clauſes in it relating to a private perſon.

Caſe 434.

Dennis *againſt* Roberts.

Venue.

ACT OF COMPOSITION, and a compoſition purſuant thereto, was pleaded in bar to an action of debt upon a bond, without reciting the act, or laying *venue* for the compoſition; and for this faults

Judgment was given for the plaintiff.

Adj

Adams *againſt* Cox. Caſe 435.

Bail in *London* never excepted to.

R CURIAM. In *London* the plaintiff never excepts againſt ail, but there is an officer who receives bail; and if he take icient bail, upon complaint made to the aldermen he muſt r pay the debt, or the profits of his office are ſequeſtered until ebt is ſatisfied. And when a cauſe is removed up hither, the nd clerk below are diſcharged; and if the bail given below be d here, they may be excepted againſt.

White *againſt* Mullony. Caſe 436.

Addition.

ATHEMATIC MASTER being offered for bail by the name of gentleman,

OLT, *Chief Juſtice*, ſaid, he was one by his profeſſion.

Birch *againſt* Wood. Caſe 437.

Stipend can be claimed by preſcription by body politic or corporate only. S. C. Salk. 506.

ICAR libelled in the ſpiritual court for a ſtipend of four pounds a-year, claiming it by preſcription.

nd a prohibition was moved for upon a ſuggeſtion, that none claim a ſtipend by preſcription but a corporation or body ic.

nd ſo ſaid HOLT, *Chief Juſtice*; and that a ſheriff, though ovable at the will of the king, may claim a fee as incident to ffice.

at againſt the prohibition were cited *Litt. Rep.* 19. and 51.

* [250]

The King *againſt* Dutton and Others, Printers. Caſe 438.

If a libel be couched in ſuch terms that THE JUDGES may conceive themſelves the objects of it, the Court will remove the indictment, tho' found at *The Old Bailey*.

N INDICTMENT being found againſt the defendants in *London* for printing and publiſhing a paper intitled "THE BLACK AM," wherein certain perſons were ſcandalouſly deſcribed, ſo ybody that knew them might know them to be the perſons de- ed, and among others THE RECORDER OF LONDON was led;

nd a *certiorari* was moved for by MONTAGUE, inſinuating, it would be a hardſhip to be tried at THE OLD BAILEY, e ſome of the Judges might take themſelves to be ſcandall'd hat paper;

HE COURT ſaid, that they ſeldom would grant a *certiorari* to OLD BAILEY: yet they granted one here, though it could e tried here this Term; for a *certiorari* into a foreign county to have fifteen days between its *teſte* and return; and though ſent it may be returned *immediate*, yet ſtill there muſt be n days between the *teſte* of the writ and the return of the jury, h could not be within this Term.

Caſe 439.

Anonymous.

There ſhould be four days between the return of the *poſtea* and judgment entered.

Tidd's Practice, 598. 629.

PER CURIAM. Regularly there ought to be *four days* b the return of THE POSTEA and judgment entered; th there be four days of the Term unſpent at the return there be not ſo many days to come of Term, there ought to utmoſt time within the Term; but ſtill judgment may be that Term.

Caſe 440.

Auſten *againſt* Baker.

Aſſumpſit in conſideration that *A.* would deliver goods to *C.* he *B.* would ſee him paid.

ASSUMPSIT againſt *Baker* upon a promiſe ſuppoſ made by him to pay for goods delivered by the to *A.*

HOLT, *Chief Juſtice*, took this difference: If *B.* deſi deliver goods to *C.* and promiſe to ſee him paid, there *aſſum* againſt *B.*; though in that caſe he ſaid, at *Guildhall* he required the tradeſman to produce his books to ſee whom was given to. But if after goods delivered to *C.* by *A.* *B* *A.* "*You ſhall be paid for the goods*," it will be hard to ſad with the debt (*a*).

(*a*) By 29. *Car.* 2. c. 3. "No action "ſhall be brought whereby to charge a "perſon on any ſpecial promiſe to anſwer "for the debt or default of another, un- "leſs the agreement upon which ſuch "action is brought ſhall be in writing." And it was formerly a rule, that where the undertaking was *before the delivery*, and there was a direction to deliver the goods and *I will ſee them paid for*, it is an *original undertaking*, and not within the ſtatute, *per* LORD MANSFIELD, in Mawbrey *v.* Cunningham, Hilary 1773. But if (though before delivery) the promiſe is conditional, as if *B.* deſire *A.* to deliver goods to *C.* and ſay, "*I will pay you if* "*C. does not*," this is a *collateral undertaking* within the ſtatute, Jones *v.* Cooper, Cowp. 228. And it is now determined, that there is no diſtinction between a promiſe made *before* or *after* delivery; and therefore where *B.* aſked *A.* if he was willing to ſerve one *C.* and on *B.* replying that he did not know *C.* ſaid, "*not know him you know me, and* "*you paid*," it was held a collateral promiſe, though made before the g delivered to *C.* Matſon *v.* 2. Term Rep. 80. And the ge now is, that if the perſon for the goods are furniſhed is lia any other promiſe by a third per that debt muſt be in writing, it is void by the ſtatute of 2. Term Rep. 81. Read *v.* Naſ 305. Fiſh *v.* Hutchinſon, 2. Burkemire *v.* Darnel, 6. M And therefore if a tradeſma goods to *A.* at the requeſt and *B.* who ſays, before the deli "*will be bound for the paym* "*ment as far as* 500*l.* *or* 100*l* a collateral promiſe on the p *if it appear that credit was given well as B.* Anderſon *v.* Hayma Bl. Rep. 120.

Caſe 441.

Anonymous.

A jury may have refreſhment, but not at the expence of either of the parties.—7. Mod. 156. Tidd's Pract. 605.

PER CURIAM. If a jury eat and drink before givi privy verdict, if it be not at the charge of the party for the verdict paſſes, it ſhall not be cauſe to ſet aſide the verdi

Anon

* Anonymous. Case 442.

REMPTORY RULE never ought to be put upon one thout notice. Rule not to be peremptory without notice.

Kilbey *againſt* Weyberg. Case 443.

ATTORNEY having promiſed to accept a declaration from other, was compelled, upon motion and affidavit of the fact, Attorney.

The King *againſt* The Mayor of Exeter. Case 444.

AS HELD BY THE COURT, that *a writ of mandamus* ought e delivered to him that is to make the return, and that is AYOR in this caſe. *Mandamus* to be delivered to him who is to make the return.

c, 27. S. C. 4. Mod. 33. S. C. 1. Show. 258. 364. S. C. Comb. 197. S. C. Holt, 169. C. 2. Ld. Ray. 223.

Anonymous. Case 445.

T, *Chief Juſtice.* By the courſe of the Court, one bound keep the peace ought to continue upon his recognizance ar *(a)*. Recognizance for the peace to continue *a year.*

e Rex v. Bowes, 1. Term Rep. 696. and 2. Hawk. P. C. 7th edit. ch. 60. ſe 9.

Anonymous. Case 446.

T, *Chief Juſtice.* Upon an old iſſue there ought to be two erms notice of trial. Notice of trial.

The King *againſt* Fox. Case 447.

INDICTMENT for exerciſing a trade, not having ſerved to it e ſpace of ſeven years, *infra regnum Angliæ aut Walliæ*, was l for this exception, for it ſhould be *aut Walliam.* Indictmen for exerciſing a trade, not having ſerved thereto.

Anonymous. Case 448.

CURIAM. If overſeers of the poor, being convened be- two juſtices to make their accounts, do refuſe, the remedy peal to the quarter ſeſſions *(a)*. Overſeers.

e 43. *Eliz.* c. 2. ſ. 4.; the 2. c. 38. ſ. 4. and 5. Rex v. Salk. 533. Rex v. Bartlett, . Rex v. Whitear, 3. Burr. Rex v. Juſtices of Berkſhire, 8 P. L. 266. Rex v. Mickle- onſt's P. L. 268. reſpecting the ainſt overſeers accounts; and Rex v. Peake, 1. Keb. 574. Rex v. Churchwardens of Northampton, Carth. 152. Rex v. Carrock, Show. 395. Anonymous, Salk. 525. Rex v. Juſtices of Middleſex, 1. Will. 125. and Mr. Conſt's P. L. 258. reſpecting the making-up, delivery, and allowance of ſuch accounts.

Caſe 449.

Anonymous.

Bail ſpecial or common.

HOLT, *Chief Juſtice.* Action againſt the maſter of a ſhip for embezzling goods he had on board, and he was held to *ſpecial bail*; but if it were for negligent keeping, *common bail* would have done.

* [252]

Caſe 450.

Beal's Caſe.

Attorney's perſon under the power of the Court.

BEAL, *an attorney* of the Court, ſued in the ſheriff's court for his fees; and upon motion he was forced to refer it * to THE MASTER, for that his perſon is under the power of the Court.

Caſe 451.

Machill *againſt* Malton.

A man may be ſued out of a dioceſe for ſubſtraction of tithes within it.

MACHILL had occupied lands in the dioceſe of *York* for ſeven years before, and had lived all his life at *Lincoln*; and at the end of ſeven years, being in the dioceſe of *York* as evidence, he was ſerved with a citation for ſubſtraction of tithes of thoſe lands.

S. C. 2. Lutw. 1057.
S. C. New Lut. 335.
S. C. 2. Salk. 549.
S. C. 5 Mod. 450.
S. C. 3. Salk. 90.
S. C. Carth. 4-6.
S. C. 1. Ld. Ray. 452. 534.
13. Co. 4.
Cro. Jac. 221.
Cro. Car. 97. 162.
Hard. 421.
1. Lac. Abr. 616.
6. Com. Dig. "Prohibition" (F. 9.).
Fitzg. 110.

GENNER. *Serjeant*, moved for a prohibition upon the ſtatute of 23. *Hen.* 8. c. 9. againſt citations out of dioceſe, and quoted 13. *Co.* 6. *Palm.* 488. *Hob. Jones v. Jones.* 1. *Ke.* Rep. 328. SECONDLY, Executor in ſeveral dioceſes cited in one, prohibition lies. If executor be to pay legacies in another dioceſe, where there are no *bona notabilia*, the way is to transfer the will thither, where the legatee lives. *Godb. Rep.* 191. 2. *Brownl.* 18.

On the other ſide were urged *Jeffrey's Caſe* (*a*) and *Dr. Blackmore's Caſe* (*b*). And he quoted an *Anonymous Caſe* about five years before in this court, where an executor being in a dioceſe, where out of his own, but where goods lay, was denied a prohibition, becauſe citable in reſpect of the locality.

HOLT, *Chief Juſtice.* The queſtion is, Whether an inhabitant of the dioceſe of *Lincoln* be citable at *York* for ſubſtraction of tithes there? And he ſaid, that if a will be proved in the prerogative court, let the executor be where he will, they of prerogative ſhall compel him to pay legacies; and that the miſchief which occaſioned the ſtatute of *Henry the Eighth* was, that the prerogative courts of *Canterbury* and *York* uſed to cite ſubjects of all parts of *England*; and that if ſentence be in the admiralty of *France*, they will tranſmit it hither, and the admiralty of *England* will execute it. And ſo is the uſage of the civil law.

But here they granted a prohibition, becauſe it was a doubtful caſe, that it might be ſettled.

And it was ſaid at the Bar, that the canon law does not take notice of locality, but that with them all things are tranſitory; and therefore they might proceed in this caſe in the dioceſe of *Lincoln*(*c*).

(*a*) 3. Co. 64. 66.
(*b*) Hard. 421.
(*c*) See the words of the ſtatute 32. *Hen.* 8. c. 7. that the party ſhall be ſued before the ordinary of the place where the ſubſtraction was.—NOTE in *the former edition.*

NOTE,

, In this case in *Hilary Term* after, upon deliberation , CURIAM, a consultation was awarded.

MACHILL *against* MALTON.

* Piper *against* Dennis.

Case 452.

a *quo warranto* against the town of *Liskardy* in *Charles* 'econd's time, they surrendered their charter, which was ed until *King James the Second*, who in consideration of der granted a new charter to them.

A charter granted on a void surrender of a former charter is void.

held PER CURIAM, that the second charter, being in ion of a void surrender, was also void.

charter surrendered none could be mayor if he were not a rgess, and one was made a capital burgess by the charter of *ues*, and after made mayor according to the old charter. tion was started, Whether he were a legal mayor?

Person in possession of the office of mayor shall be deemed legally so till the contrary appear.

Chief Justice, and THE COURT, said, You should first ed him from being a capital burgess; for if we find one possession of an office, we shall intend him to be rightful til the contrary appears; as if *merè laicus* be presented, &c. fice, we shall take him for a clerk until first steps be an-).

S. C. Holt, 170.

e case of Alton Wood, 1. Co. 251. 2. And. 154. Hughes Berwick's Case, 5. Co. 93. Bully *v.* Palmer, ante, 247. and Lord *v.* Francis, post. 408.—NOTE *to former edition.*

Morrice *against* Green.

Case 453.

SPASS FOR ASSAULT AND BATTERY, upon demurrer ed by the plaintiff, without any imparlance, the judgment "*et prad.* G. *non venit, &c.*"

Whether on demurrer rendered without imparlance, *non venit* is a judgment by default, or on *nihil dicit*

S. C. 3. Salk 213.

HEW moved, that this was a judgment by default, when be *nihil dicit*; for a default cannot be without imparlance, ut imparlance he was not demandable; and the entry , "*et dictum fuit per Cur. quòd jungat ad morationem, et hil dicit, &c.*" And this is manifest from the constant n case of *common recoveries*, where the judgment is ever by and therefore they are forced to grant a general impar- which suit is put in suspence, and then the defendant is le.

HEY *contra*. It is a judgment upon *nihil dicit*, and *non* t be understood *non venit ad jungendum in morationc.*

HOLT, *Chief Justice*, inclined that way; but said, they ot be positive. And he said, that upon a *nihil dicit* one er take advantage of ill pleading, because there is no issue out upon joinder in demurrer it is otherwise.

Caſe 454. * Anonymous.

Scire facias againſt ſeveral, where one dies, and one eſcapes.

JUDGMENT againſt ſeveral defendants, and a *capias*, an' a *cepi corpus* returned as to one; then another of the defendants dies, and he that was in execution eſcaped, and a *ſcire facias* againſt the ſurvivor, the terretenants of the deceaſed, and him that had eſcaped.

And PER CURIAM, It may well be; but FIRST, the *ſcire facias* ought to ſuggeſt that he had eſcaped.

And SECONDLY, It ought to be *de terris et tenementis* of the terretenants of the deceaſed; and *de terris et tenementis, et bonis, et catallis*, of the ſurvivors.

Caſe 455. Parker *againſt* Flint.

Trinity Term, 9. *Will.* 3. *Roll* 363.

A houſe for the reception of bearders and lodgers, with ſtabling for their horſes, is not an inn, or alehouſe, or public houſe, on which ſoldiers can be quartered.

S. C. Holt, 366. S. C. 1. Ld. Ray. 479. S. C. Salk 387. S. C. 5. Mod. 427. S. C. Carth. 415.

BY the ſtatute of 4. & 5. *Will. & Mary*, c. 13. ſ. 18. intitled, "An Act for carrying on a War with *France*," it was enacted, "That conſtables ſhould quarter ſoldiers upon innkeepers, and "ſuch as keep alehouſes and victualling-houſes, livery-ſtables, or "ſell brandy, metheglin, or cyder, by retail:" In an action brought by the plaintiff againſt a conſtable for quartering a horſe and dragoon upon him, he pleaded not guilty, being an officer, and gave the ſtatute in evidence. The jury found, that there are wholeſome wells at *Epſom*, and that the plaintiff, during the ſeaſon for drinking the waters, indefinitely *dimiſit conclavia*, ANGLICE, *let lodgings* to ſuch as went thither to drink the waters, for the air, or for their pleaſure, and did dreſs victuals for them, and ſell them ale and beer, and entertained their horſes at eightpence *per diem*, but ſold no victuals, drink, &c. to any but the lodgers; that the plaintiff had no licence from any juſtice of peace to ſell ale; and that the defendant did billet a ſoldier and a horſe upon the plaintiff, who compelled him to find victuals for himſelf, and proviſion for his horſe, for the ſpace of two months; *et ſi, &c.*

Reſolved PER CURIAM, That the plaintiff's houſe was not a houſe within the deſcription of the ſtatute:

FIRST, It was no inn; for the verdict finds he let lodgings only, which ſhews him not compellable to entertain any body, and that none could come there without a previous contract; that he was not bound to ſell at reaſonable rates, or to protect his guests: but contrary it is in all the ſaid points in the caſe of an innkeeper, and an action ſhall lie againſt him for default, not by the name * of *hoſpitat.* but of *communis hoſpitat.* (*a*)

* [255]

SECONDLY, It is not an alehouſe or victualling-houſe, for thoſe extend only to ſuch alehouſes and victualling-houſes as are known

(*a*) Vide Reg. 105. Mo. 877. Hetly, 49. Fitz. tit. Hoſtler. Bro. Action ſur Caſe, 76. 5. *Edw.* 4. f. 2.

and

d deſcribed by ſeveral acts of parliament, which it is a crime to ep without licence; and it muſt be a *communis taberna*, wherein rink, &c. is *communiter* ſold to all the king's ſubjects (*a*); and the erdict finds that the plaintiff only ſold to lodgers. PARKER *againſt* FLINT.

THIRDLY, It was reſolved to be a ſtatute againſt the liberty of e ſubject, for before it no man was obliged to entertain ſoldiers ainſt his will, as appears by the Petition of Right (*b*) and the ſtate of 21. *Car.* 2. and therefore not to be conſtrued favourably ithout great neceſſity.

FOURTHLY, That in this caſe, the conſtable having wrongfully artered a dragoon upon him, he was anſwerable for all the dragoon d committed. Conſtable wrongfully quartering ſoldiers to anſwer all the damage.

NOTE, In this caſe HOLT, *Chief Juſtice*, held, that if one come an inn, and make a previous contract for lodging for a ſet time, d do not eat or drink there, he is no gueſt, but a lodger, and as h is not under the innkeeper's protection; but if he eat and nk there it is otherwiſe; or if he pay for his diet there, though do not take it there. And a ſign is not eſſential to an inn, : is an evidence of it. A perſon may hire *lodgings* at *an inn*, and ſo not be *a gueſt*.

NOTE LIKEWISE, It was ſaid by WRIGHT, *Serjeant*, that an keeper cannot ſell ale indefinitely without licence (*c*). And an keeper, as ſuch, cannot be a bankrupt, becauſe he does not ſell atters his proviſion (*d*). An *innkeeper* cannot be a bankrupt.

Judgment was given for the plaintiff.

(*a*) Weſt's Precedents, 71. Lamb. 1. *Jac.* 1. c. 9.
(*b*) 3. *Car.* 1. c.
(*c*) Dalton J. 32, 33.
(*d*) Criſp *v.* Pratt, Cro. Car. 549. Newton *v.* Trigg, 1. Salk. 110. Saunderſon *v.* Rowles, 4. Burr. 2065.—But ſee Vaughan *v.* Pittman, 1. Term Rep. 572. Buſcall *v.* Hogg, 3. Wilſ. 146.

The King *againſt* Beechcroft. Caſe 456.

AN INDICTMENT FOR EXTORTION againſt an officer for taking money for not carrying his priſoner to a ſpunging-e (*a*); and THE COURT looked upon it to be ſo ill a practice, they would not hear a motion to quaſh it. Indictment for extortion not quaſhed on motion.

(*a*) See 32. *Geo.* 2. c. 28. ſ. 23.

Anonymous. Caſe 457.

R CURIAM. If rules of pleading be not delivered, though he declaration be of another Term, yet the *venue* may be ged. *Venue* changed.

* Anonymous. Caſe 458.

)LT, *Chief Juſtice*. It is againſt the truſt repoſed in the Court to let judgment be entered of another Term than it is ; and it would be an intolerable miſchief to men's s. Judgment muſt be entered as of the Term it is given. Tidd's Pract. 313. 631. 692.

Anonymous.

Caſe 459.

Anonymous.

The appointment of a conſtable muſt ſhew that he is an inhabitant.

AN ORDER for making a conſtable quaſhed, *abſente* HOLT, *Chief Juſtice*, for that it did not appear by the order that he was an inhabitant of the liberty, though of the pariſh.

Old conſtable not diſcharged till new one ſworn.

The late conſtable is not diſcharged till the new be ſworn, becauſe the pariſh cannot be without an officer.

Caſe 460.

Aſhton's Caſe (*a*).

Where perſons are doing an unlawful act, if murder enſue all are guilty.

Keyl. 66. 123. *et vide Lenc Diverſitatem.*

HOLT, *Chief Juſtice*. Two, three, or more, are doing an unlawful act, as abuſing the paſſers-by in a ſtreet or highway, if one of them kill a paſſer-by it is murder in all; and whatever miſchief one does, they are all guilty of it; and it is lawful for any perſon to attack and ſuppreſs them, and command the king's peace; and ſuch attempt to ſuppreſs is not a ſufficient provocation to make killing manſlaughter, or *ſon aſſault demeſne* a good plea in treſpaſs againſt them.

(*a*) At Niſi Prius.

Caſe 461.

Anonymous.

Authority.

HOLT, *Chief Juſtice*. If *A.* employ *B.* to work for *C.* without warrant from *C.* *A.* is liable to pay for it.

Caſe 462.

Anonymous.

Executer not liable for funeral expences.

AN EXECUTOR is not liable to pay for *funeral expences* without he contracts for it (*a*).

(*a*) But ſee 3. Inſt. 202. Burn's E. L. 3d edit. 249.

Caſe 463.

Fanſhaw *againſt* Harris.

A contract "*from* the day "of the date" is excluſive of the day of the date.

A POLICY OF INSURANCE was, that the defendant undertook to pay the plaintiff one hundred pounds if *Sir Robert Howard* lived a twelvemonth *from the day of the date* of the policy (*a*), being the third of *December* 1697, and he died the third of *December* 1698.

S. C. 1. Ld. Ray. 480.

And HOLT, *Chief Juſtice*, directed the jury to find for the plaintiff. And he ſaid, If a man be born on the third of *December*, and die the ſecond of *December* twenty years after, making a will on that day, it would be a good will.

(*a*) See 1 Ld. Ray. 280. 2. Ld. Ray. 1096. 3. Wilſ. 294. Powell on Powers, page 435. to 469. and the caſe of Pugh v. The Duke of Leeds, Cowper, 714.

Journal

Jourdan's Caſe.

Caſe 464.

ORMATION was filed againſt *Jourdan*, an enſign of the ards, for reſcuing one arreſted by a Chief Juſtice's warrant e *Park*.

Information for a reſcue in *the Park*.

* Beckman's Caſe.

Caſe 465.

; was perſonated as bail in an action; and NORTHEY moved to vacate the record upon affidavit, which did not make the learly out.

Where bail is perſonated, record may be vacated.

LT, *Chief Juſtice*. If it had manifeſtly appeared to be a trick, ould relieve you; but the caſe being doubtful, we cannot e the record, but you may have your action.

1. Hawk. P. C. 7th edit. 393.

RTHEY. Then you will then order by rule, that we may it to a *ſcire facias* againſt us, according to 2. *Cro.* 256.

t *negatum fuit*.

Anonymous (*a*).

Caſe 466.

TION was made for an attachment for non-performance of an award.

There muſt be *perſonal notice*, and a *demand of the money*, to bring a party into contempt for not performing an award.

d PER CURIAM, There muſt be a poſitive affidavit of perſonal of award and demand of the money all at one time, becauſe gs the party into contempt; but if the party keep out of the n purpoſe, there muſt be an affidavit thereof, and of endeavour find him out and ſerve him; and it is but of late that atents have been the means to compel performance of award; e old remedy was caſe (*b*).

his caſe was in the court of com- ns.

(*b*) See Rex *v.* Tooley, poſt. 312.

Neal *againſt* Spencer.

Caſe 467.

ACTION ON THE CASE for arreſting the plaintiff without auſe of action.

An action on the caſe for arreſting without cauſe of action will not lie, unleſs he be held to exceſſive bail. Poſt. 273.

PER CURIAM, Action lies not, if it be not that he was held *ſive bail*; and of that opinion is HALE and VAUGHAN HOBART.

INZ at the Bar ſaid, he knew it adjudged in my LORD 's time, that an action would lie for arreſting one, *ubi nihil vel ſaltem non tantum*, and holding him to exceſſive bail (*a*).

TREBY, *Chief Juſtice*, cited *Reeves's Caſe*, ſoon after horation, where it was held by the Judges, in oppoſition, as

e Daw *v.* Swaine, 1. Sid. 424. *v.* Monger, Stiles, 378. Goſlin *v.* . Guntar, 1. Saund. 228. Saberts, 1. Salk. 13. Atwood Wilcox, 2. Wilſ. 302.

he

NEAL *againſt* SPENCER.

he believed, to OLIVER's Judges, that it would not lie for arreſting without cauſe, and holding to ſpecial bail; but the contrary had been adjudged ſince.

And judgment here for the defendant.

"*Quod cum, &c.*" good in caſe, but bad in treſpaſs.

AN EXCEPTION had been taken to the declaration, that it was "*quod cum, &c.*"

POWELL, *Juſtice*, ſaid, moſt of the precedents in caſe were ſo; but without doubt it would be bad in treſpaſs.

BLENCOW and TREBY, *Juſtices*, ſaid, they could ſee no difference.

* [258]

Caſe 468.

* Walker *againſt* Walker.

General *indebitatus* will not lie for money won at play.
S. C. ante, 69.
S. C. 5. Mod. 13.
S.C Comb. 303.
S. C. Holt, 329.
3. Lev. 119.
6. Mod. 128.
1. Salk. 22. 125.
2. Bac. Abr. 15. 620.
Fitzg. 302.
Cowp. 37.
1. Term Rep. 616.
Kyd on Bills, 100.

INDEBITATUS ASSUMPSIT generally for money won at play; and verdict; and general damages;

AND MOVED *in arreſt of judgment*, that it would not bear an action upon the implied conſideration of winning or loſing, without more ſpecial words; and it being for play, it is no more than a *nudum pactum* (*a*).

And PER CURIAM, In caſe of play upon tick there muſt be a ſpecial mutual promiſe; but it has been held, that upon evidence they need not prove a ſpecial mutual promiſe, becauſe the nature of the thing implies one; but it muſt be ſet forth in pleading.

And PER CURIAM, The ſtatute ſhall be conſtrued largely in odium of gameſters; and therefore if one loſt upwards of one hundred pounds to two at one ſitting, both the ſums would be void: but if one loſe ninety-nine pounds to *A.* and then, on purpoſe to avoid it, loſes twenty pounds to *B.* there *A.* may ſpecially ſet out the fact, and ſo avoid it (*b*).

Judgment was given for the defendant.

(*a*) See the caſe of Jackſon v. Colegrave, Michaelmas Term, 3. *Will. & Mary*, Roll. 610. Carth. 338. and 1. Sid. 394. 2. Vent. 175. where it is adjudged, that *indebitatus* will not lie on ſuch a promiſe implied.—NOTE a ſecond edition.

(*b*) NOTA BENE. Vide Crouch's Caſe, Michaelmas Term, 11. *Will.* 3. fol. 336.

HILARY TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.* }
Sir Thomas Trevor, *Knt. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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* Wiggan *againſt* Branthwaite. Caſe 469.

Hilary Term, 10. *Will.* 3. *Roll* 332.

TRESPASS FOR TAKING GOODS. The caſe was: The manor of *Broomhall* was ſeiſed in fee in right of his monaſtery of the manor of *Broomhall*, and had wreck by preſcription came to the king's hands, by the diſſolution of monaſteries, came to the *Eighth*, by which the wreck, being a royal franchiſe, granted to *A.* him *jure coronæ*; and being ſo ſeiſed, grants the office of admiral of *England* to the *Lord Viſcount L'Iſle*, "the office of "admiral, with "all wrecks at "ſea, and all "profits to the "ſaid office be- "longing;" this does not paſs the wreck appurtenant to the manor. d after this he grants the manor, &c. to *B.* under which wreck belonged by preſcription laintiff in the action claims.

L *for the defendant* urged, that the wreck being L'*Iſle* before, and not recited in the grant to *B.* he grant of the king to *B.* and therefore the plain-

ief Juſtice, over-ruled this on evidence at the : the wreck belonged to the manor by preſcrip- t paſs as appurtenant to the office of high-ad-

S. C. Holt, 758. S C. 1. Ld. Ray. 473. Vaugh. 159. 5. Co. 106. And 2 Inſt. 168. 2. Will. 23.

WIGGAN *againſt* BRANTHWAITE.

And it being moved to have it found ſpecially, it was refuſed; and a *bill of exceptions* was tendered and ſealed, and *a writ of error* brought, and error aſſigned.

It was argued by HAWLES, *Solicitor General*, and WHITAKER, that beſides the grant of wreck appurtenant to the office of high-admiral, there is alſo a grant of *maris ejecta*, which is not relative to the office, and will comprehend a grant of all wreck then in the hands of the king; and the reſtraining clauſe of "*eidem ſpectant.* * [260] "*et pertinent.*" ſhall not * relate to the wreck of ſea granted; for wreck cannot belong to the office by preſcription, for the office itſelf is within time of memory.

But by HOLT, *Chief Juſtice*, Wreck may be claimed by preſcription, and may belong to the lord-admiral by preſcription; for the lord-admiral's office is an antient office, *tempore dont*, though it might not be veſted in a ſingle perſon, or in the ſame manner as it is now. In *Dyer*, 152. *b.* there is a preſcription for the lord-high-admiral to grant the office of "Regiſter of the admiralty" for life; and he made no doubt but ſome wreck might belong to the admiral by preſcription; as that about the cinque ports, and ſuch places where he was moſt converſant in antient time. And as to the objection, in regard that there is but one *conceſſit*, or word of grant, all the clauſes ſhall be taken to be dependant on it, and the clauſe of reſtraint ſhall extend to all of them; otherwiſe if there had been any word of grant intermediate.

And the judgment was affirmed.

Caſe 470.

Pollard *againſt* Awker.

A cuſtom can not be tried in the ſpiritual court.

LIBEL IN THE SPIRITUAL COURT by the clerk of a pariſh for fourpence a-year due to him by *cuſtom* from every maſter of a family in the pariſh. The defendant denied the cuſtom; and a prohibition was granted, becauſe a cuſtom is not triable there, except in the caſe of a penſion.

Caſe 471.

The Inhabitants of King's-Langley *againſt* The Inhabitants of St. Peter's, in St. Alban's.

Seſſions may adjourn matter for further debate.

S. C. 2. Salk. 605.
S. C. Sett. & Rem. 120.
S. C. Fort. 323.
S. C. 1. Ld Ray. 481.

EXCEPTION was taken to an order made at the quarter-ſeſſions, becauſe the appeal was lodged at the next quarter-ſeſſions, and it appeared on the face of the order that it was not then determined, but was adjourned over for further conſideration.

And it was held by THE COURT, that one muſt appeal to the next quarter-ſeſſions; yet it may be adjourned over on debate for further conſideration.

And it was confirmed.

Lay

* Lacy *againſt* Williams. Caſe 472.

Michaelmas Term, 10. *Will.* 3. *Roll* 586.

.OR OF A JUDGMENT given in the court of common as (*a*) in ejectment; and a ſpecial verdict was found, *viz.* *W. Lacy* the younger, being tenant in tail male, in the ſeventh *ember*, in the ſecond year of *William and Mary*, *G. Keith* it a writ of entry *ſur diſſeiſin* of the lands in queſtion againſt *Corbet*, returnable *quind. Martini*; at which time *Miles* appeared and vouched *W. Lacy* the younger, who was not in court; upon which a *ſummoneas ad warrantizandum* teſted the twenty-eighth of *November*, in the ſecond year of *m and Mary*, returnable *octab. Hill.* after; after the iſſuing f which writ, and before the return of it, *W. Lacy* the r, by leaſe and releaſe firſt and ſecond of *January*, conveyed ds to *Miles Corbet* to make him a complete tenant to the '. *Miles Corbet* (*b*) appeared at the return of the ſummons *rantizandum*, and entered into the warranty; and a reco- as had to the uſe of *William Lacy* and his heirs; afterwards l without iſſue male, leaving the leſſor of the plaintiff, his er and heir; and the defendant claimed as brother and heir male.

If the tenant gain the freehold any time before judgment, it is good.

S. C. 2. Salk. 568.
S.C.Comb. 425.
S.C. Carth. 472.
S.C. 1. Ld. Ray. 227. 475.
S. C. Holt, 614.
Cro. Jac. 455.
Lutw. 1549.
Carth. 472.
Show. 347.
1. Mod. 218.
Noy, 126.
Pigott, 29.
Cruiſe, 18 to 21.

ſingle queſtion was, Whether this common recovery, in there was no tenant to the *præcipe* when the ſummons *rrantizand.* iſſued, but made pending the writ of ſummons, ore the return, be good?

as argued in the king's bench by PRATT *for the plaintiff in* nd KEEN *for the defendant*; and the judgment was affirmed.

by HOLT, *Chief Juſtice*, The general rule is, if a man gain hold after the writ purchaſed, at any time before judg- his makes the writ good; for why ſhould the recovery be t becauſe it is againſt a man who had nothing at the time of overy had? But here he has. In a *ſcire facias* againſt terre- , after a recovery, they ought to plead that the tenant had ; in the land *die impetrationis brevis, nec unquam poſtea*, hout that it is ill. If the vouchee come in and plead the voucher, *per* non-tenure of the tenant, he o ſay, "*die impetrationis brevis, nec unquam poſtea*;" ſo nant plead "non-tenure" in abatement: but if the tenant by act of law, pending the writ, as by deſcent, he ought ſpecially; and as the writ is made good by a ſubſequent , ſo the voucher is made good by a ſubſequent entry into by the vouchee; ſo there is a good tenant, a good vouchee, ood * recovery. And as to the cauſe of action, the de- may have a good cauſe of action, though the tenant has- * [262]

(*a*) See S. C. 1. Ld. Ray. 227. (*b*) W. Lacy.

no

Lacy *againſt* Williams.

not the lands, for the right of the demand is the cauſe of the action; and therefore, if the tenant has the land to tender before the judgment, it is good *(a)*. Judgment was affirmed.

(a) By the ſtatute 14. *Geo.* 2. c. 20. ſ. 6. a recovery is good if the freehold be conveyed to the tenant to the *præcipe* by the end of the term, ſeſſions, or aſſizes, in which the recovery was ſuffered, and the perſons joining in ſuch recovery had a ſufficient eſtate, and power to ſuffer the ſame.—And a recovery has been held good, although the tenant did not acquire the eſtate until after the day on which the writ of ſciſin was returned to have been executed. Burton *v.* Rigby, 2 H. Bl. Rep. 46. 5. Term Rep. 177. And indeed as common recoveries are now conſidered as common aſſurances, the Courts will endeavour, by every poſſibility, to ſupport them, Atkins *v.* Hurle, 1 Burr. 115. Selwin *v.* Selwin, 1 H. Rep. 254. Martin *v.* Strachan, 1. Wil. 73. Crowe *v.* Baldwin, 5. Term Rep. 112.

Caſe 473.

The King *againſt* Sudbury, Heaps, and Others.

Two perſons cannot be guilty of a riot.

2. Hawk. P. C. 7th edit. c. 65.

THE DEFENDANTS were indicted, for that they *riotuſè routeſè aſſemblaverunt*, and ſo aſſembled committed a battery on *Mary Ruſſell*. Two of them were found guilty, and all the others were acquitted; and judgment was arreſted, for two cannot commit a riot.

But by HOLT, *Chief Juſtice*, If the indictment had been, that the defendants, with divers other diſturbers of the peace, had committed this riot, and the verdict had been, in this caſe the king might have judgment.

Caſe 474.

Jeveſon *againſt* Moor.

Hilary Term, 9. *Will.* 3. *Roll* 430.

A declaration that the plaintiff was poſſeſſed for a term of years of a colliery ſituate in the pariſh of *A* near to the king's highway leading through the ſaid pariſh of *A* and that the defendant, to hinder the carriage of the coals, obſtructed the ſaid highway aforeſaid, *by reaſon* whereof the plaintiff totally loſt the benefit of his ſaid colliery, &c. is good, although no ſpecific injury be particularly ſtated; for although the defendant was guilty of *a public nuiſance* in obſtructing *a common highway*, and for ſuch offence could only be puniſhed by *public proſecution*, yet, as a *ſpecial damage* was occaſioned thereby, he is liable to *a civil action* at the ſuit of the party injured, and the *quantum* of damage ſuſtained is for the conſideration of the jury on the evidence; at leaſt the omiſſion of ſtating the *particular injury* is cured by the verdict.—S. C. 1. Salk. 15. S. C. Comy. Rep. 58. S. C. 1. Ld. Ray. 486. S. C. Comb. 480. S. C. Carth. 451. S. C. Holt, 10. Co. Lit. 56. 5. Co. 73. 2. Black. Com. 219, 220. 2 Will. 58. Stra. 686. Bull. N. P. 7. Burr. 2424.

CASE. The plaintiff declared *(a)*, that he was poſſeſſed, for a certain term of years yet to come, of a certain colliery in *Dale*, near the highway leading from ſuch a place to ſuch a place, *et ſic retrorſum*, through which his cuſtomers uſed to come and go, to take and carry away the coals dug out of his ſaid colliery; that on the fourteenth of *March*, in the ninth year of *William the Third*, he had two hundred loads of coals there dug ready for ſale; and that the defendant, intending to hinder the plaintiff of the benefit of his colliery, and to ſeduce the cuſtomers from the plaintiff's colliery to a colliery of the defendant's near adjacent, after the fourteenth of *March*, and before the action brought, laid ſix cart-loads of ſtones and an aſh-tree athwart the ſaid highway at *Dale*, within the two bounds aforeſaid, and continued them there for two months; *per quod* the plaintiff loſt the profit and benefit of his colliery; and alſo the coals lying on the ground were much damnified, *pro defectu emptorum ex cauſâ præmiſſâ ſic impedit et obſtruct.*

(a) See the pleadings, 2. Salk. 636. and 3. Ld. Ray. 436.

On

1 not guilty, verdict for the plaintiff; and, upon motion in of judgment, a rule made *Curia adviſare vult* indefinitely.

Jevison against Moor.

HE COURT argued *ſeriatim.*

id FIRST, they all unanimouſly agreed, that this being in a way, and conſequently a public nuſance, no action would lie , generally ſpeaking; but if any perſon had a particular da- , which would diſtinguiſh his caſe from that of all * the reſt e king's ſubjects, they held that an action would lie for him, laid his damage ſpecially enough to ſupport his action.

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nd GOULD and TURTON, *Juſtices*, held the plaintiff had done re, eſpecially it being after verdict.

OULD, *Juſtice*. This declaration is ſpecial enough, even demurrer, *à fortiori* after verdict. Indeed if the plaintiff had ſaid, "*per quod* his carriage could not paſs that way," that een bad; becauſe that is a common damage with the reſt of ing's ſubjects; and, at that rate, every one that had occaſion s that way would have his action, which would beget ſuch a plicity of actions as the law will not endure; but here he "*per quod* he loſt the ſale of his colliery;" and that is ſpe- 1. *Rol. Ab. pl.* 8. 7. *Hen.* 7. 3. *Godbolt*, 343. The ing of a way may be a general or a ſpecial damnification; and queſtion is here, Whether *per quod* has done its office? It is Bull. N. P. 78. ted, that it does not appear that the plaintiff loſt any buyer; I anſwer, that when a man lays a ſpecial damage to tain his action, he need not, many times, ſet forth the pre- certainty thereof; as if a maſter bring treſpaſs for beating ervant, he cannot recover if he do not ſhew a ſpecial ge, as loſs of ſervice, yet he need only ſay "*per quod* he loſt ſervice *per magnum tempus*," and that is well enough; for the *tum* of time there is not traverſable. 1. *Leo.* 136. *Hob.* 9. *Co.* 53. In an action for a private nuſance, the plaintiff luded *ad nocumentum* of his houſe, without ſhewing *coment*, good; for it is to recover damages only. So here it is not ſary to inſtance who the buyers were; for it appears, FIRST, the coals there were ready for ſale; SECONDLY, That the way ſtopped, whereby, &c. There is a difference where the da- e is the reſult of one ſingle inſtance, as loſs of marriage, which ot be but to one ſingle perſon, there it ought to be aſcer- d who that perſon was; but where the damage is compli- d of many inſtances, as here, it is otherwiſe; and it would nconvenient if it were not; for it might be impoſſible to tell his cuſtomers were to have been; and if he had named ſome iled in the evidence of proving a loſs of any of them, he muſt been nonſuited; and he would be ſo reſtrained to them men- in the declaration, that he could give evidence of none . But it is otherwiſe on an indictment for barratry (*a*);

(*a*) See 1. Term Rep. 752. 754.

JEVERSON *against* MOOR.

you may give more or leſs particulars in evidence than you have mentioned; becauſe that only raiſes or leſſens the fine, but here it is to have damages from a jury. SECONDLY, This is * againſt a wrong doer; in which caſe this general way of declaring has prevailed in all the courts in *Weſtminſter Hall*; for there it is not neceſſary to make a title to the plaintiff further than generally, "that he was poſſeſſed, &c." As for depriving one of his common, *vide* 9 *Hen.* 6. 42. 45. 27. *Hen.* 6. 1. 1. *Vent.* 274 *Trinity Term*, 27. *Car.* 2. *Rell* 1501. 1. *Rol. Ab.* 63. *pl.* 31. 1. *Cro.* 510. 11. *Hen.* 4. *pl.* 41. *b.* *Hilary Term*, 8. *Will.* 3. *Roll* 316. *in C. B. Baker v. Moon*; and ſo is *Hart and Bagſt's Caſe*, 2. *Jones.* 156. *Aller*, 22. 1. *Leo.* 236. *Style*, 105. 1. *Vent.* 13. Eating graſs *cum averiis*, good, without more.

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TURTON, *Juſtice.* An action will not lie without ſpecial damage; *Br.* "*Action ſur Caſe*" 6. *Nuſance* 1. *Cro. Eliz.* 684. 5. *Co. Williams's Caſe.* *Vaughan*, 335. 340, 341. 9. *Co. Merſt Caſe.* 2. *Cro.* 446. 1. *Rol. Ab.* 88. 1. *Inſt.* 56. *Keb. Mennell and Saltmarſh's Caſe.* SECONDLY, If ſpecial damage be ſufficiently alledged, the *quantum* of them is not material. FIRST, Here it appears that the plaintiff had a colliery expoſed to ſale; SECONDLY, That this was the way through which his cuſtomers uſed to come and go; THIRDLY, That the defendant *maliciouſly*, &c. did ſtop this way; FOURTHLY, That the plaintiff thereby loſt the ſale of his coals: and he relied upon 1. *Rol. Ab.* 104. And he ſaid that the verdict would aid it at all events; and for defects cured by verdict he quoted 1. *Keb.* 847. 2. *Saund.* 250. 1. *Vent.* 114. 126. 3. 115. 232. 1. *Rol. Ab.* 63. 2. *Cro.* 565. *Cro. Car.* 510. 1. *Rol. Ab.* 88.

ROKEBY, *Juſtice.* This action will not lie without ſpecial damages for two reaſons: FIRST, Becauſe it is a general injury to the whole body of the kingdom, and therefore the action is given only to the king, who is the head. SECONDLY, Becauſe of the multiplicity of actions that would enſue, if every one might have an action that is ſtopped of this way. But when an action is upon the ſpecial damage, it ought to be ſo certainly alledged, as that the Court may be ſatisfied that it is a ſpecial damage. And here if the *per quod* had been omitted, it had been undoubtedly bad, for that had been but a general injury; and though the *per quod* ſeems to have two things, *viz.* the loſs of the ſale, and alſo the leſſening the value of the coals, yet in truth all is but one, *viz.* the loſs of the profit of his colliery. If there had been a ſufficient cauſe of action without the *per quod*, the uncertain laying damages under the *per quod* would not vitiate. It is not ſaid that any particular perſon intended to buy, and by reaſon of this ſtopping forbore it; and he compared it to the caſe in 3. *Bulſtrode* 75. where the plaintiff had laid in his declaration, that he purpoſed to ſettle land * upon his ſon, and to let part to tenants; and that the defendant did ſlander his title, whereby, &c.; and the judgment was arreſted, becauſe he had not ſhewn in certain any who had forborn being

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ing his tenant upon that account. And ſuppoſe the caſe of *Hart* *Baſſett* to be law, it is not like this; for there was an actual damage *in præſenti*, but here is only a potential damage; becauſe it may be the cuſtomers would not have come if the way had not been ſtopped; or if they had come, it may be he had not agreed of the price with them. But it is objected, they could not name their cuſtomers, becauſe they could not know them. I anſwer, it is for that reaſon they ought not to have damage, becauſe they do not know what damage it has done them; and they would have recovered ſomething for perhaps nothing.

JEVISON *againſt* MOON.

HOLT, *Chief Juſtice*. The action will not lie generally. But two queſtions are in this caſe: FIRST, Whether the plaintiff may have this action in this caſe generally, in reſpect of the proximity of his colliery to the highway? SECONDLY, Whether the ſpecial damage be ſo laid as to maintain the action? As to THE FIRST, The action will not lie for the proximity; for though the way be more convenient for him, than to others of the king's ſubjects, yet he has no more right to the way than the reſt of the king's ſubjects, and therefore is no more intitled to an action for the ſtopping generally than another; and this is the reaſon of *Finiaux v. Hovedon (a)*. Every man who brings an action for an injury, it muſt bear proportion to the right which he has; as where one has common belonging to his houſe or ground, or a way to his houſe or ground. 1. *Saund.* 115. *A* ſeiſed of a mill in a town, and *B.* ſeiſed of another mill in the ſame town, and a preſcription, that inhabitants ſhould come to one or the other of the mills, as they pleaſed, if inhabitants come to neither they both muſt join in the action, in reſpect of the right which is in common; and an action muſt always be managed according to the right; and this highway was made for all the king's ſubjects.

SECONDLY, There is no particular damage, for the offence is ſtopping the highway; and if the defendant had been indicted for this, the indictment would conclude "*ad commune nocumentum omnium ſubdit. domini regis per illam viam tranſeun.*;" and without doubt the count would have been bad without the *per quod*; and is not like the caſe put by my BROTHER GOULD, of diverting water-courſe from a mill; for the plaintiff had a particular right to the * water-courſe to his mill; and ſo was the caſe of *St. John Moody*; it was for ſtopping a private way, and the *per quod* did not make the *git* of the action: But in all general nuiſances, where the action is particular, the *per quod* makes the *git* of the action; and there it muſt be made certain. The caſe of 27. *Hen.* 8. is right, if rightly underſtood; that is, an action will lie according to *Herbert* if ſpecial damage be laid, as it was not in that caſe; but according to BALDWIN, it will not lie without ſpecial damage, as that caſe was; and ſo is 1. *Inſt.* 56. And the ſpecial damage muſt be more than hindrance of paſſages; as falling in,

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(a) 3. Cro. 664.

JEFFESON *againſt* MOOR.

breaking hand, or leg, &c. and I always underſtood it ſo. It is objected, that he loſt his cuſtomers, and that that is particular. I anſwer, ſuch a precedent overthrows all the Books, which agree that damage muſt be ſpecially alledged; for the damages muſt ſupport the action; and therefore they muſt ſhew ſome particular cuſtomer whom this ſtopping hindered to come. As to the caſe in 1. *Roll. Ab.* 63. it would be in point, but I have always heard it denied to be law; and the ſame author, in the caſe of *Fell v. Brewer (a)*, ſays, that loſs of cuſtomers is no ſpecial damage in ſuch a caſe; but where words, &c. in themſelves are actionable, ſuch an allegation with a *per quod* is good, in aggravation of damages. 2. *Rol. Rep.* 79. 1. *Rol. Ab.* 36. 1. *Cro.* 140. 2. *Bulſt.* 276. where one was ſaid to be incontinent, whereby none would marry him, and not good; but he ſhould name ſomebody who refuſed upon that account; and there is no diverſity between the principal caſe and an action for words which in themſelves are not actionable; for in both caſes there muſt be a ſpecial damage. This is like the caſe of *Paine v. Paterick (b)*, and *Menel v. Saltmarſh (c)*. The firſt caſe was thus: There was a town which maintained a wherry for all paſſengers paying toll, and a cuſtom that the inhabitants of the town ſhould paſs *gratis*; and the perſon, whoſe ferry it was, gave over keeping it, againſt whom one of the inhabitants brought his action: the cuſtom was adjudged good, but it was held that the action would not lie, and that the defendant was only puniſhable by indictment; and that there was no more ſpecial damage to the inhabitants of the town than to any other, by the *ceſſer* of the ferry, *viz.* the not paſſing; and that paſſing free was only conſequential. In the caſe of *Menel v. Saltmarſh*, the corn was rotten becauſe he himſelf could not bring it home; and the caſe of *Hart v. Baſſett (d)* is a weak caſe, but ſtill the declaration there was better than this; for it

*[269] * appears that the plaintiff was a farmer of tithes, and was liable to an action if he ſuffered the tithes to lie on the land beyond a convenient time; and that he was alſo put to great expence. If an action be made maintainable for ſuch imaginary damages, it would overthrow the maxim in law, that an action does not lie for a common nuſance; and if the plaintiff cannot tell whoſe cuſtom he loſt, he cannot ſhew that he loſt any thing; and the action is always in lieu of the loſs.

What ſhall be done when the Judges are divided after a *Cur. ad vult.*

Then the queſtion was, the Court being thus divided, How judgment ſhould be?

And by HOLT, *Chief Juſtice*, if the diviſion had been on the firſt motion in arreſt of judgment, before any rule made, the plaintiff muſt have had judgment; but here is an *adviſare vult* indefinitely, and ſo judgment cannot be entered without continuances; and while the Court is divided, it continues an *adviſare vult*. If the rule had been temporary and expired, the matter had

(a) Roll. Rep. 56.
(b) 3. Mod. 289.
(c) 1. Keb. 847.
(d) 2. Jones, 156

en at large. But he ſaid a writ of error lay, and therefore nuſt be judgment one way or other. But let it ſtay; *et ſic* Judgment was ſtayed (*a*).

JEWSON *againſt* MOOR.

in the caſe of *Philips v. Ryand*, *Eaſter Term*, the eleventh *George the Firſt*, the Chief Juſtice ſaid it was reverſed by nion of all the Judges in the exchequer chamber.

is ſaid, that by the conſent of *Chief Juſtice*, this caſe was arore all the Juſtices of the common d Barons of the exchequer at Serjeants Inn; and they were ALL OF OPINION for the plaintiff, that the action well lay. S. C. 1. Ld. Ray. 495.

Grant *againſt* Burton.

Caſe 475.

E FACIAS againſt bail, who pleed no *capias* iſſued againſt principal; the plaintiff replied, that there did, *prout patet ordum* in this court, and prays that the record may be in- The defendant demurred, *quia malè concluſit* his repli-

Prout patet per recordum cannot be replied after iſſue joined. Ante, 215. Creamer *v.* Wickett.

IT WAS MOVED *for the plaintiff*, that the demurrer might aſide, becauſe the defendant tendered an iſſue, and the joined with him, and pleadings were at an end; and no emained but to inſpect the record.

d CURIA *conceſſit*, and the demurrer was ſet aſide.

Harvey *againſt* Williams.

Caſe 476.

Hilary Term, 10. *Will.* 3. *Roll* 160.

debitatus aſſumpſit, the defendant pleaded *quòd ante exhinem billæ* the plaintiff became a bankrupt, whereby he unable to diſcharge the defendant, becauſe the ſaid money, ich time as he became a bankrupt, was due to ſuch creditors ld ſue out a commiſſion: on demurrer, judgment for the f, for this is no plea.

Bankruptcy of the plaintiff cannot be pleaded to an *indebitatus aſſumpſit*. S. C. 1. Ld. Ray. 496. 2. Term Rep. 113.

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* The King *againſt* Harris.

Caſe 477.

INQUISITION of forcible entry into the rectory of *Lanteant* in *Glamorganſhire* was taken the eighteenth of , in the ſeventh year of *William the Third*, 1695, and reſ- preſently granted, which was ſoon after ſet aſide by a *ri removendo*; and the tenth of *December* 1691, a new reſ- was granted, on which the inquiſition was removed by *ri* into the king's bench, and ſeveral exceptions taken to uiſition.

On forcible entry, reſtitution granted after three years ſet aſide. S. C. Carth. 496. S. C. 1. Salk. 260. S. C. 3. Salk. C. Holt, 324. S. C. 1. Ld. Ray. 440. 482. S. C. Comy. Rep. 61. S. C. 5. Mod. 443.

THE KING *againſt* HARRIS.

FIRST, That it was *præſentatum extitit* in the preterperfect tenſe.

HOLT, *Chief Juſtice.* That would be fatal if *extitit* were neceſſarily in the preterperfect tenſe; but there is an old verb called *extito* which may have *extitit* in the preſent tenſe.

THE SECOND was to the caption, which ſaid, they *jurat. & onerat.* but does not ſay with what.

And this ſtuck with the Court. *King v. Faulker (a)*, and *Chaloner v. Chaloner (b)*.

And IT WAS RESOLVED, that a *vi laica removenda* could only remove the force, but not meddle with the poſſeſſion.

But then it was further ſtrongly objected, that the ſecond reſtitution upon the inquiſition was irregularly obtained, becauſe the juſtices of the peace had executed their power by putting the party into poſſeſſion immediately after the inquiſition taken, and could not grant a new reſtitution afterwards.

But by HOLT, *Chief Juſtice*, If poſſeſſion be delivered upon *habere facias poſſeſſionem*, or grant of reſtitution, and it is avoided immediately by a new force, there the party may have a new *habere facias poſſeſſionem*, or grant of reſtitution; but if after the reſtitution awarded the party enjoy quiet poſſeſſion, and he be removed by a new force, there he ought to reſort to a new remedy.

SECONDLY, It was argued, that the grant of the ſecond reſtitution was not good, becauſe it was not granted in convenient time; for the intent of the ſtatute of *Hen.* 6. was to give ſpeedy remedy; or at leaſt after ſuch delay, as there has been here, there ought to be ſome proceſs to renew the inquiſition, upon which the party might come in and ſhew what he can ſay why reſtitution ſhould not be granted; for the poſſeſſion might have become lawful by ſubſequent conveyance; and this is agreeable to the reaſon of the law; for in perſonal actions after a year and a day, at common law, the party could not have execution upon any judgment, but was to put his action of debt on his judgment, till the ſtatute of *Weſtminſter the Second* gave him a *ſcire facias*; and in real actions he muſt have a *ſcire facias*. In criminal caſes alſo, if execution be deferred, * the priſoner muſt be brought to the bar before a rule is made for his execution.

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Kely. 13. 2. Lev. 62. *acc.* To which HOLT, *Chief Juſtice*, agreed, and cited *Knightley's Caſe (c)*, who had judgment of death for high treaſon pronounced againſt him in *Eaſter Term*, and execution was countermanded, and mean while *Trinity Term* paſt; and there being orders from above for his execution, in the long Vacation all the Judges met

(a) 1. Saund. 249. 2. Keb. 506.
(b)
(c) Holt, 398. Comb. 364.

erjeants Inn, and it was agreed by them all, that without being ed to the bar firſt he could not be executed. THE KING *againſt* HARRIS.

and HOLT, *Chief Juſtice*, was of opinion, that if *Trinity Term* come, though not paſt, it would have been the ſame thing.

and THE COURT here, after conſideration, were of opinion that itution ought to be granted, by reaſon of the long delay, which ht be a great inconvenience and prejudice to purchaſers; and grounded this reſolution on *Dr. Bonham's Caſe (a)*.

HOLT, *Chief Juſtice*, ordered a ſpecial entry to be made, becauſe it appeared on examination that reſtitution was not rded till three years after the inquiſition, therefore reſtitution ated to *Harris*.

(*a*) 8. Co. 119.

The City of London *againſt* Vanacre.

Caſe 478.

UPON a *habeas corpus* directed to the mayor, aldermen, and ſheriffs of *London*, to remove the body of *Vanacre*, with the cauſe of detaining him, they returned, that the city of *London* is an ancient city, and county of itſelf, and that the citizens of *Londons dont*, have been a body politic, known by divers names; that *King John*, by his charter, granted to them the ſhireve- ck of *London* and *Middleſex*, and that they ſhould make out of themſelves whom they pleaſed ſheriffs; that MAGNA CHARTA and divers other ſtatutes confirm all their liberties; that they have a cuſtom to make by-laws; and that if any of them be dou- ve or difficult to be underſtood, or if any matter ariſe for ich a convenient remedy was wanting, the common-coun- may take orders touching the ſame; that time out of mind e has been a court of record before the mayor and aldermen ne inner chamber of *Guildhall*. Then they return an act of mmon-council, made 7. *Car.* 1. which repeals all former by- s touching the election of ſheriffs, and appoints that the election ll be the twenty fourth of *June* yearly; and if in the interim e ſhall be a vacancy, then at ſuch time and place as the lord yor and court of aldermen ſhall * appoint; and that no freeman the city ſo elected ſhall be exempted from the execution of the ce, unleſs he voluntarily take an oath before the court of alder- , that he is not worth ten thouſand pounds; and bring ſix purgators with him, ſuch as the lord mayor and aldermen approve of, to ſwear that they believe what he has ſworn is ; and that if any freeman elected ſheriff, and proclaimed ne huſtings in the preſence of the lord mayor and ſix alder- , or in his abſence before eight aldermen, ſhall not come to next court of aldermen and declare his conſent, and enter into

The by-law of the city of *London*, that the election of SHERIFFS ſhall be on *Midſummer-day*, or, in caſe of vacancy, on ſuch day as the court of aldermen ſhall appoint, and that the perſon elected, being a freeman, ſhall not be diſcharged from ſerving the office unleſs he ſwear before the court of aldermen that he is not worth 10,000l. and verify the oath by ſix compurgators; and that if any freeman ſo elected ſhall not, on being proclaimed on the huſtings before the lord mayor and ſix aldermen, or, in the mayor's abſence, before eight al-

n, attend the next court and declare his acceptance of the ſaid office, and give bond in 1,000l. ſonment, he ſhall forfeit 400l. to be recovered in the mayor's court of the city, is a good by-law 5. Mod. 438. S. C. Salk. 142. S. C. Carth 480. S. C. Holt, 431. S. C. 1. Ld. Ray. 456 of London v. Wood, poſt 676. Show. 95. Burr. 1829. 1831. 1. Wilſ 235.

THE CITY OF LONDON *against* VANACRE.

a bond of one thouſand pounds to the chamberlain, to appear at the vigil of *St. Michael*, and to accept the office, not having a reaſonable cauſe to be allowed by the lord mayor and court of aldermen, ſhall forfeit four hundred pounds, one hundred to be paid to the next ſheriff that ſhall hold; the reſt to the uſe of the mayor and commonalty; to be recovered in the court of record held before the mayor and aldermen. Then the return ſets forth, that the defendant was choſen and proclaimed, &c. and for his default, &c. a plaint was levied, &c.

HOLT, *Chief Juſtice*, delivered the opinion of THE COURT, that the by-law was good, and a *procedendo* ought to be granted.

The principal objections againſt the by-law may be reduced to four.

Of common right every corporation may make a by-law concerning a franchiſe granted to them.

And THE FIRST is, that the ſubject matter, concerning which this by-law is made, is not within the cuſtom of the city; for the ſhirevewick of *London* and *Middleſex* is granted within time of memory, and therefore not within a cuſtom, which is immemorial: and beſides, the ſhirevewick of *Middleſex* is out of the juriſdiction of the city, and therefore their by-law cannot extend to it. As to the firſt part of this objection, that no by-law can be made about this franchiſe, becauſe granted within time of memory; I anſwer, that admitting the cuſtom will not warrant ſuch a by-law, yet it may be made of common right; for of common right every corporation may make a by-law concerning any franchiſe granted to them, becauſe it is for the welfare of the body politic (*a*), and included in the very act of incorporation. *Hob.* 211.

A corporation has a power for the better government of the place, to make by-laws.

SECONDLY, Every corporation has a power to make a by-law for the better government of the place, which is the very touch-ſtone by which all by-laws are to be judged: Now, if it be for the advantage of the king and people to have ſubſtantial perſons ſerve in this office, this by-law on that account is good. *The Chamberlain of London's Caſe (b).* An act of common-council was made, that all citizens and ſtrangers * who ſhould expoſe any cloth to ſale in the city of *London*, ſhould bring it firſt to *Blackwell-Hall*; and held a good by-law both as to the citizens and ſtrangers, becauſe it was for the credit of the market and public good.

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If a charter of incorporation to appoint a ſheriff, they have a power to compel the acceptance.

THIRDLY, The very conſtitution of *King James's* charter obliges the citizens to make by-laws concerning this election; for the franchiſe is not only granted to them, but that they ſhall chuſe out of themſelves whom they pleaſe to be ſheriffs. Now it would be in vain to give them a power to appoint the ſheriff, if they have not a power to compel thoſe whom they ſhall appoint; and the acceptance of the charter obliges them to perform the terms on which it was given: And as every citizen is capable of

(*a*) See Strange 486 and 1. Burr. 216. (*b*) 5. Co. 62.

the

benefit of the franchiſe, ſo he muſt ſubmit to the charge alſo. THE CITY OF LONDON *againſt* VANACRE.
t v. Cumberland (a). And he took it that this franchiſe is an antage to the city, for in *King Charles the Second's* time a ſurler of it would have compounded for their franchiſe.

'OURTHLY, If they do not make ſuch an election as the letters nt appoint, it is a forfeiture of the franchiſe; for all franchiſes granted on condition that they ſhall be duly executed accordto the grant; and if they neglect to perform the terms, the nts may be repealed by *ſcire facias*; therefore it is neceſſary they have a coercive power to compel perſons to take the ofupon them without cuſtom, or elſe the franchiſe would be loſt he city: But admitting it could not be good without cuſtom, he was of opinion that the by-law was warranted by the cuſ, though the ſubject matter of it had its original within time nemory; for general cuſtoms may be extended to new things ch are within the reaſon of thoſe cuſtoms. *Snelling's Caſe (b)* n authority in point, where, by the cuſtom of *London*, execu- may pay debts, *viz.* ſimple contracts, in equal degree with ds; and adjudged that adminiſtrators were within the cuſtom, gh created by 31. *Edw.* 3. within time of memory, becauſe hin the ſame reaſon. As to the objection, that he may be ined for this refuſal, as was the caſe of *Larwood*, ſheriff of *Nor-b*, I anſwer, that will not be ſufficient to hinder the forfeiture he franchiſe; for if there ſhould be a refuſal when the ſheriff nes to be ſworn, then there will be a vacancy, and an obſtruc1 of juſtice: beſides, the penalty of the by-law is for refuſing to lare before-hand whether he will hold at the time, which is not ictable, and not for refuſing to take the office upon him at the e. As to the part of the objection, that they cannot make a -law * about the ſhirewick of *Middleſex*; I anſwer, though execution of the office is without the city, yet the intereſt of franchiſe is within the city, as being a franchiſe belonging to m, and therefore within their juriſdiction; for it is their proty, and veſted in them as the body politic of the city; the ſons to be choſen are citizens, and all acts neceſſary to be done wards it, as appearance, &c. are done in *London*.

If do not make election, it is a forfeiture of the franchiſe.

General cuſtoms may extend to new things which are within the reaſon of thoſe cuſtoms.

Though may be indicted, yet liable to pay the forfeiture.

* [272]

THE SECOND OBJECTION was, that it is unreaſonable to impoſe oath on the party, and more unreaſonable to find ſix compurtors, and to be ſuch as the lord mayor and aldermen ſhall apve of. But I anſwer, this is an eaſe to them from a burthen, every citizen was originally compellable to ſerve; and this exes them if they ſwear themſelves not worth ten thouſand pounds, ich they are not compelled to do; it is a voluntary oath, which ot againſt law. 3. *Cro.* 469. 1. *Sid.* 283. And as to the ing ſix compurgators, it is but in imitation of the common

) Cro. Jac. 339. 521. S. C. Poph. S. C. 3. Bulſt. 193. S. C. Godb. S. C. 1. Roll. Rep. 359. S. C. ll. Rep. 63.

(b) 5. Co. 82.

law;

THE CITY OF LONDON *against* VANACRE.

law; for though the Books mention twelve, yet the courſe of the common pleas is to have but ſix; and it is reaſonable the mayor, &c. ſhould have the refuſal of them, that they be not infamous perſons.

THE THIRD OBJECTION is, that the perſon choſen is obliged to appear at the next court after his election, under the penalty of four hundred pounds, without a reaſonable excuſe, to be allowed by the mayor and aldermen. I anſwer, whatever excuſe he makes, if they allow it, the city is bound by it; and if they refuſe to allow a reaſonable excuſe, it is not final; for it may be pleaded or given in evidence in an action brought for the penalty by the city; for it was not the meaning of the common-council to put an arbitrary power in the lord mayor and aldermen, but is like the power given by the ſtatute of 23. *Hen.* 8. c. 5. to commiſſioners of ſewers, to do ſeveral things according to their diſcretion; but that muſt be underſtood of a legal diſcretion. 5. *Co.* 100.

Every citizen obliged to take notice of election, for are virtually preſent.

THE FOURTH OBJECTION, That no proviſion is made for the party elected to have notice; and he may be in the country at a great diſtance, or beyond ſea. I anſwer, every citizen is ſuppoſed to be an inhabitant, and dwelling there, and preſent at all public meetings; and if he be not, it is his own neglect, of which he ſhall take no advantage. And as to the objection, that all freemen are not preſent at the election, but only liverymen, I anſwer, it does not appear by the return that the election is made by liverymen, but muſt be intended to be by all the citizens; but admitting it was, every citizen is obliged to take notice of what they do, becauſe they repreſent the whole; they are virtually preſent, and

* [273]

muſt take notice, as all people do of * parliament acts. The election of ſheriff is a notorious act, and the proclamations of it on the huſtings are public: in a *præcipe quòd reddat* ſummons on the land is ſufficient: ſo proclamation in the county court in caſe of an outlawry, though the party be removed into another county. If a man think he is liable to be choſen, and is at *York*, he may get ſomebody to inform him of it, and to go to the court of aldermen to give him time to appear; otherwiſe ſuch citizens at the time of election would get out of the city, on purpoſe to avoid being choſen.

Wherefore judgment that a *procedendo* ſhould go.

Caſe 479.

Robins *againſt* Robins.

Caſe for maliciouſly holding to ſpecial bail without cauſe, the ſame for which he was arreſted ſhould be ſhewn.

ACTION ON THE CASE: The plaintiff declared, that the defendant *prætextu et colore cujuſdam medii proceſſûs in lege arreſtari cauſavit* the plaintiff, and held him to ſpecial bail without cauſe; on not guilty, and verdict for the plaintiff,

—S. C. 1. Salk. 15. S. C. 1. Ld. Ray. 503. S. C. Ray. Ent. 446. Ante, 259.

I

Hilary Term, 11. Will. 3. In B. R.

T WAS MOVED *in arreſt of judgment*, becauſe the writ is not wn on which the arreſt was, nor is it averred by whom he is ſecuted; whereas it ought to have been ſhewn more certainly l ſpecially, *viz.* that he owed the defendant but ſo much, and t the defendant, intending to oppreſs him, had cauſed him to be eſted for ſo much, and to be held to ſpecial bail; but here it s not appear to the Court that the ſum for which he was ar- ted required ſpecial bail, which being the point of the action ght to be ſhewn at large. And whereas it was objected, that s matter could not be ſpecially ſhewn, becauſe the writ remains the hands of the officer, I anſwer, The plaintiff might have ved the Court that the ſheriff might have returned the writ, then all would appear Beſides, the warrant under the hand he ſheriff to the bailiff would be good evidence (*a*).

Robins *againſt* Robins.

) The judgment was accordingly ted, S. C. 1. Ld. Ray. 504. See 1. Wilf. 305. 376. Comy. Rep. 190. Dougl. 215. 2. Term Rep. 225. 3. Term Rep. 183.

Cremer *againſt* Wickett.

Caſe 480.

Eaſter Term, 11. *Will.* 3. *Roll* 456.

AN ACTION OF FALSE IMPRISONMENT the defendant leaded miſnomer in abatement by attorney; the plaintiff de- red.

If a defendant plead a miſnomer *by attorney*, it is good cauſe of demurrer. S. C. Carth. 517. S. C. 1. Ld. Ray. 550.

nd exception was taken to the plea, becauſe miſnomer cannot leaded by attorney; for he having put in his warrant of at- ey in the name by which they declare againſt * him, he ſhall ſtopped by his warrant to ſay, that he is known by another ie (*a*).

* [274]

HOLT, *Chief Juſtice*, was of opinion, that this was good cauſe efuſe the plea, but not cauſe of demurrer; it is no error in Court to admit one by attorney that ought not. And as to eſtoppel he ſaid, that the entry of it on the roll was not the rant of attorney, but only a memorandum of it, which was in- luced by WRIGHT, *Chief Juſtice*, in *King James the Second's* e, for before they were on a roll by themſelves, and ſo they ht to be ſtill; and upon conference with the reſt of the Juſtices gment was given *quòd billa caſſetur*.

Et per GOULD, *Juſtice*, If the plaintiff would take advantage he eſtoppel by the warrant of attorney, he ought to have re- d to it, and relied on it (*b*).

) See Brook. Abr. "Miſnomer" 2. Fitz. Nat. Brev. 27. Theolal's 3, 365. b. and the caſe of Britton Bradar, 1. Ld. Ray. 117.

) The Judges ſaid, that they would conſult with their Brothers to the end that this point might be ſettled; and afterwards, at another day, by the whole Court judgment was given *quòd billa caſſetur*, S C. 1. Ld. Ray. 569.

Harper

Caſe 481.

Harper *againſt* Davys.

On new trial the record muſt be of the Term the plea was entered.

S. C. Carth. 448.
S. C. 1. Ld. Ray. 510.

ASSUMPSIT. The plea was entered in *Eaſter Term*, memorandum was of a bill entered in *Hilary Term*. iſſue joined, it was tried by *niſi prius*, and the verdict w aſide, and a new trial granted, and tried this Term in *L* In the new *niſi prius* roll the *placita* were of this Term; that the party appeared and pleaded this Term, and v thereon.

And now judgment was arreſted, becauſe the iſſue on the roll is of *Eaſter Term*, and the new trial is but a continuan the ſame cauſe; and ſo the record of *niſi prius* differs fro plea-roll; and ſo adjudged in the caſe of *Duburteen* v. *(celler (a)*.

(a) Ante, 189. S. C. 5. Mod. 399. S. C. Carth. 447. S. C. 1. Ld. Ray

Caſe 482.

Sir William Lacon Child *againſt* Harvey.

Where the day in bank is before the day of *niſi prius*, it is not amendable.

S. C. 1. Salk. 48.
S. C. Carth. 506.
S. C. 1. Ld. Ray. 511
2. Will. 144.

SCIRE FACIAS upon a recognizance to pay money at certain; *ſolvit ad diem* pleaded; and iſſue joined; and v at *niſi prius*, for the plaintiff.

NORTHEY moved to ſet it aſide, becauſe the *diſtring jurata* were returnable *a die Sanctæ Trin. in tres ſeptimanas* JOH'ES HOLT, *&c.* 27 *Junii prius vener.* which 27th o was the day after *tres Trin.*

But the award on the plea-roll being *tres Mich.* it was to amend this miſtake of the clerk, becauſe in all caſes in there is a record to amend by, and the amendment does no the point in iſſue, the Court may give leave to amend; b award on the roll is right, ſo is the iſſue: and the Judge *prius* had authority to try the cauſe by the ſtatute of *Wi the Second*, c. 30. which requires only that a day * and pla tain be appointed in the ſhire; and this is a plain miſpriſion clerk, in writing "*tres Trin.*" for "*tres Mich.*" 1. *Cr* 3 *Cro.* 353. *Dyer*, 260. and the *Caſe of Sir R. Barnard*

* [2 - 3]

HOLT, *Chief Juſtice*, though the day of return *poſtea* ſhould be miſtaken, yet if the cauſe was tried on th day it would be good; but here the day of *niſi prius* being poſſible day, and the authority of the Judge confined to it, on another day will be without authority, and therefo amendable. If the *diſtringas* and *jurata* had been right, t *prius* roll might have been amended (*b*), as was in *Sir R ard's Caſe*.

Wherefore here the trial was ſet aſide.

(b) See the ſtatute 5 *Geo.* 1. c

Bond *againſt* Spark, Coleman, and Hunt. Caſe 483.

SSAULT AND BATTERY: Iſſue joined on *ſon aſſault de-meſne*; two were acquitted, and *Sparks* found guilty; and is certified by the Judge to be againſt evidence; and motion new trial.

New trial not to be, unleſs againſt all.

t THE COURT ſaid, a new trial could not be granted except ſt all. Whereupon the attorney for the defendants conſented ie two defendants who were acquitted, that they ſhould go a new trial, and quit the coſts which they might have the plaintiff on their acquittal; and *Sparks* conſented to pay aintiff coſts.

d ſo a new trial was granted againſt all (*a*).

See Collier v. Morris, Bull. N. P. and 2. Burr. 1224. 1. Bl. Rep. 298.
Parker v. Godin, 2. Stra 814. Tidd's Pract 608.

Doctor Brookbanck *againſt* Allenſon. Caſe 484.

CTOR BROOKBANCK, chancellor of *Durham*, iſſued a citation *ex officio* againſt *Allenſon* for incontinency, and that ould be perſonally ſerved with it; and if it could not be ſo, o fix it, on a *Sunday*, on the church-door; and it was ſo done, ie was *excommunicated* for not appearing.

A *citation* iſſued by the chancellor of a dioceſe againſt a perſon for incontinency, may be ſerved on a *Sunday*, notwithſtanding the 29. *Car.* 2. c. 7.

R COUNSEL *moved for a prohibition*; becauſe by 29. *Car.* 2. no proceſs ſhall be ſerved on a *Sunday*; and that by that ſta- his citation is void.

t THE COURT was of opinion it was good, and proper to ecuted on that day; and that the ſtatute 29. *Car.* 2. c. 7. it forbid the execution of ſuch proceſs as could not be but on y; and ſo it is in the caſe of a ſummons in real actions (*a*); by the eccleſiaſtical laws proceſs is to be ſerved on a *Sunday*, neral words of this ſtatute will not take it away.

S. C. 2. Salk. 625. S. C. 5. Mod. 450. S.C. Carth. 504. 1. Stra 387. 1. Term Rep. 165. 3. Term Rep. 642. 4. Term Rep. 557. 5. Term Rep. 25. 1. H. Bl. Rep. 9.

(*a*) See Taylor's Caſe, poſt. 667. and Burr.

* Michell and his Wife *againſt* Garrett. Caſe 485.

IE by huſband and wife for a cauſe ariſing before marriage; ie defendant pleads, that the plaintiffs *nunquam legitimo nonio copulat. fuerunt*; replication, that they were married at time and place; demurrer.

Ne unque accouple in matrimony no plea in perſonal actions.

Eſpin. Dig. 124, 125.

d judgment for the plaintiff; becauſe the plea was naught; perſonal actions you muſt lay the matter on the fact of the ge to make it triable by the country, and not upon the right marriage, as in appeals and real actions.

Yates

Caſe 480.

Yates *againſt* Fettiplace *(a)*.

Perſon deviſed out of land, payable at a future day; if the perſon to whom payable dies before the day of payment, it is ſunk; *aliter* out of perſonal eſtate.

A SEISED of lands in fee had iſſue a daughter, and by his will he charged the lands with five thouſand pounds for her portion, to be paid at her age of twenty-one years, or day of marriage, and dies; the daughter dies at ſix years of age; ſecond huſband of the daughter's mother takes out adminiſtration to the daughter and to mother his wife.

THE QUESTION was, Whether he ſhould have the five thouſand pounds, or whether it ſhould be ſunk for the benefit of the heir?

S. C. 2. Vern. 416.
S. C. Prec. Ch. 140.
S. C. 2. Eq. Ab. 541. 655.
S. C. 2. Freem. 243.
S. C. 1. Ld. Ray. 508.
1 Vern. 321.

And my *Lord Chancellor* SOMERS decreed for the heir; and held, that in all caſes where a man charged a ſum certain to be paid, as here, out of the real eſtate, there, if the perſon die, the money ſhall be ſunk for the benefit of the heir; but if a man deviſe a perſonal legacy, or a ſum to be paid out of a term for years, and the legatee die before the age, &c. the executors or adminiſtrators of the legatee ſhall have the money, becauſe it was *debitum in præſenti*, though *ſolvendum in futuro (b)*.

2. Vern. 92. 417. 424. 439.

(a) This caſe was in the court of chancery.—AND NOTE, The report of this caſe in 2. Vern. 416. is, as to the date of it, different. Note, *reſerve.*

(b) See 2. Peer. Wms. 276. 6m. 3. Peer. Wms. 138. Brown. Cha. Caſes, 123.

Caſe 487.

Hilliard *againſt* Gennings.

A deviſe to *A.* and his heirs, *and* if he die without iſſue of his body or under twenty one years of age, remainder to *B.* &c. paſſes an eſtate-tail determinable on the event of *A.* dying under the age of twenty-one.

THIS was an iſſue directed out of chancery, to be tried in a feigned action, whether *Thomas Gennings* the younger, by any laſt will in writing, deviſed to *William Hilliard* the plaintiff.

Upon a ſpecial verdict it was found, that *Thomas Gennings*, huſband of the defendant, was ſeiſed in fee of the lands in queſtion, and had iſſue by the defendant *Thomas Gennings, junior*, his only ſon, and two daughters, *Mary* and *Elizabeth*, who are now living; that *Thomas* * the father made a will the twenty-ſeventh of *December* 1679, in theſe words, "I DEVISE to my ſon *Thomas Gennings*, "and his heirs for ever, all that my manor of *Earneſly*, which "I lately purchaſed of *H. W.* but if it ſhall happen that my ſaid "ſon ſhall die before he attain the age of twenty-one years, or "without iſſue of his body lawfully begotten, then my ſaid land "ſhall be divided between my ſaid daughters, *Mary* and *Eliza-*"*beth*, and their heirs for ever" That the father died ſeiſed as aforeſaid; that *Thomas Gennings* the ſon entered and became ſeiſed *pront lex poſtulat*, and being above the age of twenty-one years made his laſt will the ſeventh of *April* 1695, in the preſence of *A. B.* and *W. Hilliard* the plaintiff, and they ſubſcribed their hands as witneſſes,

* [277]

S. C. 2. Eq Ab. 508.
S. C. Carth. 514.
S. C. 1. Ld. Ray. 505.
S. C. Comy. Rep 60.
S. C. Freem. 509 Cro. Eliz. 525. Cro. Jac. 250. Raym. 452. 3. Lev. 70. Hob. 29.

ſſes, in the preſence of the teſtator, whereby he deviſed the lands to the plaintiff *William Hilliard*, and his heirs; that *as Gennings, junior*, was alſo heir to his father; that on the eenth of *May* 1695, he died ſeiſed without iſſue of his body. HILLIARD *against* GENNINGS.

nd it was urged by CARTHEW *for the plaintiff*, that *Thomas ings, junior*, had all the fee in him, and therefore might well e to the plaintiff; for the word "or" ſhall be conſtrued d;" ſo that the remainder could not veſt till *Thomas Gennings* without iſſue, and under the age of twenty-one years of age; to make another conſtruction would be to defeat the intent of leviſor; for he meant that the iſſue of his ſon ſhould inherit e his own daughter; but if "or" ſhall not be conſtrued d," then if the ſon has iſſue, and dies before the age of twenty- ſuch iſſue ſhall not inherit, which is expreſsly contrary to ntent of the deviſor; then the remainder limited over would ɔid. *Cro. Eliz.* 525. 1. *Vent.* 62. 1. *Leo.* 74.

it by HOLT, *Chief Juſtice*, There is no neceſſity to conſtrue ' as "and" in this caſe; for it might be the deſign of the r to hinder him from marrying till his age of twenty-one ; and as for the caſe in *Cro. Eliz.* that was adjudged to be ſtate-tail.

ıt to this point THE COURT gave no opinion; and afterwards T, *Chief Juſtice*, denied that caſe to be law (*a*).

ıt THE SECOND POINT was, Whether this was a good will in the ſtatute of Frauds and Perjuries, 29. *Car.* 2. c. 35. leviſee being one of the three witneſſes? A deviſee cannot be a witneſs to the will. 3. Mod. 263.

nd THE COURT were of opinion, that for this reaſon the de- was void; for every day's experience ſhews that the deviſee ıot be a witneſs to prove that will; and the intent of the act to prevent people from ſetting up forged wills, which would ruſtrated, if deviſees ſhould be allowed as witneſſes of their will (*b*).

ıdgment was given for the defendant *niſi cauſa*; and in *Hilary* the rule was made abſolute.

See Framingham *v.* Broad, ld. 140. 3. Atk. 390. Right *v.* nond, 1. Stra. 429. Barker *v.* s, 2. Stra. 1174. Boſworth *v.* ds, 2. Vezey, 240. Fearnes C. ſ.

See the ſtatute 25. *Geo.* 2. c. 6. ſ. 1. alſo on this ſubject S.C. Carth. 514. Wyndham *v.* Chetwynd, 1. Burr. 414. 424. and Holdfaſt on the Demiſe of Anſtey *v.* Dowſing, 2. Stra. 1253. Baugh *v.* Holloway, 1. Peer. Wms. 557. Price *v.* Lloyd, 2. Vezey, 374. and Kindſon *v.* Kearſey, 4 Burn. E. L. 86.

EASTER

EASTER TERM,

The Eleventh of William the Third,

IN

The Common Pleas.

Sir George Treby, *Knt. Chief Juſtice.*
Sir Edward Neville, *Knt.*
Sir John Powell, *Knt.* } *Juſtices.*
Sir John Blencowe, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 488.

* Scattergood *againſt* Edge.

If a deviſe be made to truſtees for years, and then "*to their*" "*ſon male of*" "*A.*" he having no iſſue at the time of the deviſe, and dying afterwards without iſſue during the term: "*and if A.*" "*ſhould die*" "*without iſſue*" "*male, then to*" "*the iſſue male*" "*of B.*" he having iſſue a ſon at the time of the deviſe,

THE CASE found by ſpecial verdict was: *Ralph Edge* being ſeiſed in fee of the manor of ——— in *Norfolk*, did by will bearing date in the thirty-ſixth year of *Charles the Second*, deviſe the manor to ———, ſerjeant at law, for *eleven years*, upon ſeveral truſts. Afterward in the will were theſe words; "ITEM, I give and bequeath my ſaid manor of ——— to the "firſt iſſue male of *George Jakes*, and the heirs males of his body; "and for default of ſuch heirs males of his body, to the ſecond "iſſue male of *George Jakes* and the heirs males of his body; and "for default, &c. to the third iſſue male, &c. and ſo to the fourth; "PROVIDED they ſhall reſpectively take upon themſelves the ſur-"name of *Edge*; and if they ſhall not take upon them the ſurname "of *Edge*, or ſhall die without iſſue male, as above, then to the "firſt iſſue of *G. Convay*" (who at the time of the deviſe had iſſue a ſon) "with limitation, as above, to the ſecond, third, and fourth "ſon of *George Convay*, and ſame *proviſo* as above; and if they "ſhall not aſſume the name, &c. then to *Paul Edge* for life, and

and expiration of the term: the deviſe *to the iſſue of A.* is void, and *the iſſue of B.* ſhall have the eſtate (*a*).—S. C. 1. Eq. Abr. 187. S. C. 1. Salk. 229. Carth. 2. Salk. 238. Show. 91. 3. Brown. C. C. 396.

(*a*) Caſes T. T. 145. 150. 1. Wilſ. 225. 4. Burr. 2257. 3. Term Rep. 16. after

r to the heirs males of his body; remainder to the right s of the deviſor."

SCATTERGOOD *againſt* EDGE.

rge Jakes had no iſſue at the time of the deviſe, and died t iſſue; the leaſe for years expired; the iſſue of *George*, who was in being at the time of the deviſe, entered and pon him the name of *Edge*; upon whom the plaintiff, the law of the deviſor, entered, whom *Edge* ouſted; and upon is ejectment was brought.

S CASE was argued *ſeriatim* by the Bench.

NCOWE, *puiſne Judge*, argued for the plaintiff.

ELL and NEVILLE, *Juſtices*, and TREBY, *Chief Juſtice*, for endant.

ENCOWE, *Juſtice*. It is a rule in the conſtruction of wills ort the intent of the teſtator as far as it can be made con- with the rules of law; but here it is plain that it cannot be ned in all reſpects; and therefore there remains only to r, what clauſes in the will may be made good agreeable to id what cannot, and ſo retain the one and reject the other. IRST, It is very clear that the deviſe for eleven years is good, : it is to commence immediately after the deviſor's death; : laſt clauſe of deviſe to *Paul Edge*, it is not in queſtion; whole queſtion is, Which of the two deviſes, *viz.* that to t iſſue of *George Jakes*, or that to the firſt iſſue of *George*, ſhould ſtand? for they are incompatible, and cannot both

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If the deviſe had been "to *Serjeant* ——— for eleven s, with remainder to the firſt iſſue of *Convoy*, being then *in* ' it had been unqueſtionably a good remainder. So if the to the firſt iſſue of *George Jakes* be void, the deviſe to e of *George Convoy* is good; ſo we muſt conſider this caſe, as *ge Jakes* had iſſue now, on one ſide of the Court, conteſting he firſt iſſue of *Convoy* about this eſtate, upon this will. rule, that, in all deviſes of this nature, we conſider what ır might have fallen out, and not what does fall out. A of a term to *A.* for life, and after to *B.* for life, and to *C.*, is good, if they be all *in eſſe* at the time of the deviſe; and : made to the heir of one of them, all ſubſequent truſts or ions are void, becauſe that would tend to *a perpetuity*. The le of executory deviſes of land. But if the contingency be rily to take effect in *reaſonable time*, as upon two or three t will be good; contrary, if it be to continue for many ge- ns. Executory deviſes are not aſſignable or barrable.

: ſecond deviſe here to the iſſue of *George Convoy* cannot r be good; for I hold the firſt is good; and conſequently, : of executory deviſes, and contingent truſts of term, the cannot be good; ſee the caſe of *Pell v. Brown (a)*. In-

(a) Eq. Abr. 187. Cro. Jac. 550. Bridgm. 1. 3. Palmer, 131. 2. Roll. R. 216. Godb. 282.

SCATTERGOOD *ag. inſt* EDGE.

deed, if the firſt deviſe by intent of the leſſor were to paſs a preſent intereſt, it would be void, becauſe there was none *in eſſe* to take it; and then the ſecond would be good. It appears that at the time of the deviſe *George Jakes* had no iſſue, but *George Convoy* had one; and we ought to intend the deviſor knew this, for two reaſons: FIRST, Becauſe it is improbable one would deviſe lands to one that he did not know * whether he were *in eſſe* or not; and SECONDLY, If he were in being, he would deviſe the land to him by his name, and not by deſcription of "firſt iſſue male," which is the uſual term when the party is not *in eſſe*; and therefore I conceive he intended it as an executory deviſe, and therefore good. The caſe of (*a*), a deviſe to ſuch of the daughters of *J. S.* as ſhould marry a *Norton* within fifteen years. So a deviſe to a ſon unborn by name of "firſt iſſue;" and the deviſe of the truſt of a term to "the firſt ſon of *A.*" by limitation was adjudged good. 1. *Rol. Ab.* 612. which authority was cited by HOLT, *Chief Juſtice*, in the *Duke of Norfolk's Caſe* (*b*); and by LORD NOTTINGHAM in his argument of the caſe of *Cotton v. Heath* (*c*); nor do I find that this authority was ever queſtioned, nor is there any difference between it and our caſe. Where there is an intervening limitation that would make a perpetuity, it ſhall be void, and the ſubſequent may be good: and for this the caſe of *Cotton v. Heath* is a full authority. In *Blandford's Caſe* (*d*) the limitation was to a perſon not *in eſſe*, for three years after there was a child born, who by the judgment of the Court had title to the eſtate; and truſts of terms and deviſes ought to receive the ſame conſtruction. Nor is the poſſibility in our caſe a remote one; for it muſt be in the life of *George Jakes*, or at moſt within forty weeks after, which I do not look upon as a diſtinct ſpace from his life, but rather an appendix of it; and the poſſibility in the caſe of *Baun v. Emerſt* (*e*) is more remote; and if this be a good deviſe to the iſſue of *George Jakes* by the firſt conſtitution thereof, it cannot be vitiated by matter *ex poſt facto*.

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4. Burr. 2162.

POWELL, *Juſtice*, agreed with the rule put by BLENCOWE, *Juſtice*, concerning the conſtruction of wills; and that neither of theſe deviſes could take by way of remainder, for want of a particular eſtate to ſupport them. So THE FIRST QUESTION will be, Whether the remainder to *George Jakes's* iſſue be good? SECONDLY, If not, whether that to the iſſue of *Convoy* be ſo? and THIRDLY, If both be void, Whether the plaintiff has title as heir at law? And he likewiſe agreed with BLENCOWE's motion, that this caſe ought to be conſidered as if the caſe were now between the iſſues of *Jakes* and *Convoy* upon this

(*a*) Raym. 115. 82.

(*b*) 1. Eq. Abr. 152. 2. Chancery Caſes, 1. Pollexfen, 223. 2. Chancery Reports, 229.

(*c*) 1. Eq. Abr. 171. 3. Chancery Caſes, 29. Pollexfen, 26.

(*d*) The Caſe of Blandford v. Blandford, Moor, 846. Cro. Jac. 3. Bulſt. 98. 1. Roll. Rep. Godb. 266.

(*e*) 1. Eq. Abr. 212. Raym. 82.

And he ſaid, it ſeemed plain that the deviſor intended that iſſue of *Jakes* ſhould be preferred; but he conceived ſuch it was inconſiſtent with the rules of law; for it could not ut by way of executory deviſe, and that would not do, as this ſtood. * In inheritances there may be two ſorts of execu- deviſes: FIRST, When a deviſor parts with the whole fee out im, and afterwards qualifies the eſtate of the deviſee, and contingent remainders over; and this is repugnant to the of common law, to have one fee depend upon another (*a*). e act of the party one fee cannot depend upon another; tho' it y act in law, as it is often ſeen ſince the ſtatute of 26. *Hen.* 8. for forfeitures of eſtates-tail, and ſince fines are become ſo ; and though VAUGHAN, in the caſe of *Gardner v. Sheld-*), contradicts this opinion of my LORD COKE, and is angry ſe he cites no authority for it, yet he himſelf ſhews no autho- the contrary; and it is no wonder COKE ſhews no autho- or it were to prove a thing could not be that never was done. . *Hen.* 8. 8. *b. Dyer*, 33. it is held that it cannot be, even in

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One fee cannot depend on another by act of the party, but may by act of law.

And the firſt of theſe deviſes that we find is in the caſe of *k v. Hammond*, cited in *Boraſton's Caſe (c)*, and was firſt enanced in favour of proviſion for younger children, and of leviſable by cuſtom. *Vide Cro. Eliz.* 532. 525. 360. 497. 22. *Moor*, 422. 464. In the caſe of *Pell v. Brown*, RIDGE oppoſed the opinion of the other three Judges, as point of its not being barred by recovery; and the opinion *Rol. Rep.* 835, 836. and *Style*, 274. went down with the like chopped hay; but ſince it has been ſo often paſſed over not be queſtioned now, becauſe the eſtates of many depend : but this is not like our caſe. THE SECOND ſort is when the does not part with the whole out of himſelf, but gives future to riſe upon contingencies, and leaves the inheritance to in the mean time; and this is not diſagreeable to the common s in the caſe of a deviſe, that the executor ſhall ſell land, where nds deſcend in the mean time; and when the executor doth the vendee is in from the firſt teſtator, and in pleading muſt under him; and by the ſelling, the freehold and inheritance act in law, deveſted out of the heir or lord by eſcheat, even the king, if he were lord by eſcheat, without petition, or *ans de droit.* 29. *Edw.* 3. 16. There were no other f this nature until of late. The firſt was *Hynd v. Lyons (d)*; it was the caſe in *Cro. Eliz.* 838, 819. 2. *Rol. Ab.* 793. and *Caſe (e)*; and in the caſe of *Weldon v. Elpington (f)*, they difference between an inheritance and a term; but it was at reſolved in *Manning's Caſe (g)*, that there is no difference; point prevailed againſt the opinion of a great lawyer, and

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3a. Lit. 18.
1. Eq. Abr. 197. Vaugh. 259.
781. 1. Freem. 11.
raſton's Caſe is in 3. Co. 19.
ged in 1. Eq. Abr. 190. c. 16.
aſe of Wellock v. Hammond is reported in Cro. Eliz. 204. and 2. Leon. 114.
(*d*) 2. Leon. 11. 3. Leon. 64. 70.
(*e*) Raym. 82.
(*f*) Flowden,
(*g*) 8. Co. 94. Co. Ent. 149.

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rules of common law. Now Judges ought to take great care that they do not come to be made perpetuities; for they cannot be barred by a common recovery, &c. becauſe they have no dependancy on the particular eſtate; as is adjudged in the caſe of *Pell v. Brown (a)*; and therefore to extend them beyond a common poſſibility will be dangerous: and there be two ſorts of perpetuities, an abſolute one, and a qualified one; and eſtates-tail, from the time of the ſtatute *De Donis* until common recoveries were found out, were looked upon as perpetuities. And ſuppoſe this deviſe to the firſt iſſue of *George Jakes* be good, it is to him and heirs; and if that failed, another contingent limited out, which could not be barred: and by my conſent theſe ſort of limitations ſhall never be carried beyond a life; nor do I find any authorities to the contrary, but that of *Vaughan* before cited, in which he quotes no authority; and as for 1. *Leo.* 438. I do doubt it is not law. Whether the deviſe to the firſt iſſue of *George Jakes* be good, two things occur to be conſidered; FIRST, Whether a deviſe to the firſt iſſue of one who has no iſſue at that time be good? SECONDLY, Whether a leaſe for eleven years, precedent to ſuch a deviſe, be good reaſon of a diverſity between the caſes? AND I HOLD, that if there were no precedent leaſe, a deviſe to the firſt iſſue of one, who, at that time, had none, would be void; and I find no authority to the contrary. The caſe moſt like ſeems to be a deviſe to *Fitz in ventre ſa mere*; for he was not *eſſe* at the time of the deviſe; and yet that caſe is not to be compared to ours, admitting it to be law, which has been never ſettled; but there have been varieties of opinions on it (c). The firſt I find is 11. *Hen.* 6. *pl.* 15. and there BABINGTON thought it good, and PASTON *contra*. It is in *Brook tit.* "*Deviſe*" [illegible] with a *quære*; in 7. *Co.* 9. without any deciſive opinion; and 1. *Rol. Ab.* 609, 610. with a *Dubit'*. In *Dyer*, 303, 304. Deviſe to an infant *in ventre ſa mere*, if it be a ſon, void; but I hold that not to be law, becauſe it is executory and contingent; but *à fortiori* it would be void by way of preſent intereſt. It is again mentioned in *Dyer*, 342. but no opinion; in *Moor*, 127. and no opinion; and in 177. adjudged good; but in 664. held void: in *Eliz.* 435. if there be a new publication of a will, after ſon born good; *jecus* not; in 2. *Bulſt.* 272. not good; in 1. *Rol. Rep.* void; and in *Lit. Rep.* 255. void: And thus it remained until *Charles the Second's* time. In the caſe of *Snow v. Cutler (d)* Court was divided; * but in the caſe of *Nurſe v. Yarworth* *Chancellor* FINCH held it good; and my LORD BRIDGM[illegible]

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(a) 1. Eq. Abr. 187. Cro. Jac. 590. Bridge. 1. Pahn. 131. 2. Koll. Rep. 196. 216. Godb. 282.

(b) See Caſes T. T. 145. 150. 1. Wilſ. 225. 4. Burr. 2157. 3. Term Rep. 86.

(c) See Freeman, 244. 293. and Fearn's Contingent Remainder, 429.

(d) 1. Eq. Abr. 188. c. 10. 1 [illegible] 135. 1. Sid. 153. Raym. 161. 1 [illegible] 567. 752. 800. 851. 2. Keb. 11. 296.

(e) 2. Mod. 9. S. C. Finch's Chancery Reports, 155.

he ſame, with great reſpect to former opinions; and I hold be good; becauſe the rule is, that when, by the words of the ır, it apparently is deſigned for a future intereſt or deviſe, it is ; and when the deviſe is "to *Fitz in ventre ſa mere*," with- nore ſaying, it is plain he means a future deviſe, becauſe by ery words he takes notice of his not being *in eſſe*; and that is nount, as if he had deviſed to another for a time, or let it de- to the heir for a time. But in a deviſe "to the firſt ſon of *S.*" who has no ſon at that time, none can tell by the words : deviſor whether he meant it ſhould take preſently or future- nd therefore it is no more than a preſent deviſe to a perſon n *eſſe (a)*. It is objected, that this is not like a deviſe at non law, and the eſtate may deſcend in the mean time. But ner, *Non liquet* by the words of the deviſe, that the deviſor ded it ſhould deſcend or not; and if it ſhould be good "to firſt ſon of *J. S.*" the next thing would be to make a deviſe the right heirs of *J. S.*" good; nor is the one more remote the other, for by the death of *J. S.* he ſhall have an heir, if and it may be he may not have a ſon until after his death: but theſe caſes it would be good by way of a future deviſe; as "in caſe *J. S.* ſhall have a ſon, that he ſhall have it;" that I I ſay be good, if he has a ſon in his life-time, but not to a umous ſon (*b*). – But what ſeems moſt difficult in this caſe is, ıer, there being a term of eleven years to expire, it did not to the iſſue of *George Jakes* by way of remainder, after the f eleven years; and whether in that caſe it ſhall not be in- d an *executory deviſe*; for a remainder "to *Fitz in ventre ſa* ," upon a term of years, was always held to be an executory , and good, even by thoſe who did oppoſe a deviſe "to *Fitz ventre ſa mere's*" being good (*c*). I for a long time have of opinion, that this being after the term for eleven years l be a good executory deviſe to the iſſue of *George Jakes*; pon great conſideration, I hold it naught now; nor do I go the words of the ſtatute of Wills, in which there are no words as "perſon or perſons," as in the ſtatute of Uſes; s my LORD FINCH, led by the vulgar error, ſeemed to d his opinion, if rightly reported in the caſe of *Snow v.* r (*d*). It is true, *a uſe* limited "to *Fitz in ventre ſa mere*" l, becauſe no *perſon* according to the ſtatute of Uſes; but the e of Wills makes no mention of *perſon*, and that makes the nce (*e*). * The authorities againſt me are, the caſe of

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Vide ante p. 39. *Simile.* 52.

Ante p. 39. 52, 53. *acc.*

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See Taylor *v.* Biddle, 2. Mod. Stephens *v.* Stephens, Caſes T. Goodwright *v.* Wright, 1. Stra. ndrews *v.* Fulhome, 2. Stra. Frogmorton *v.* Helliday, 3. Burr. Fearne on C. R. 426.

See 10. & 11. *Will.* 3. c. 16.

ee Freem. 244. 293. Fearne 29.

t. Eq. Abr. 188. 1. Lev. 135. 1. Sid. 153. Raym. 162. 1. Keb. 567. 752. 800. 851. 2. Keb. 11. 145. 296.

(*c*) An infant *in ventre ſa mere* is now conſidered, generally ſpeaking, as born for all purpoſes for his own benefit, Lancaſhire *v.* Lancaſhire, 5. Term Rep. 49. Doe on Demiſe of Clarke *v.* Clerke and Others, 2. H. Bl. Rep. 399. and the caſes there cited.

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Nurſe v. Yarworth (a), which was a deviſe of a term for years, remainder to the heirs of the body of the deviſee; and this was held good by *Chancellor* NOTTINGHAM, becauſe of the term for years. In 2. *Mod. Rep.* 292. a deviſe for twenty-one years, remainder to the right heirs of *J. S.* was held good for the ſame reaſon. In the eighteenth year of *Queen Elizabeth*, in *Juſtice Rhodes's* written Reports, a deviſe for years with remainder to the right heirs of *J. S.* was held good, if *J. S.* died during the term; and the caſe of *Cotton v. Heath (b)* was held good, in reſpect of a precedent term.—But the words of the will in our caſe are conſiderable. "I give and bequeath the manor of —— to *Jeant* ——, in truſt for eleven years;" and then follow theſe words; "ITEM, I give and bequeath my ſaid manor to the firſt "iſſue of *George Jakes*," by which words it ſeems plainly he meant to paſs the freehold and inheritance immediately to the iſſue of *George Jakes*, and not that it ſhould not go to him till after the eleven years, and ſo deſcend to the heir at law in the mean time; for the words are *in præſenti*, and look like an immediate deviſe of the freehold. And to the opinion of FINCH in chancery I oppoſe the opinion of the court of king's bench lately in the caſe of *Goodright v. Corniſh (c)*; and the caſe of *Cotton v. Heath* is an abridgment; and judged otherwiſe in *Sir H. Gore's Caſe (d)*, ſince *Hilary Term*, in the thirty third and thirty-fourth year of *Charles the Second*; it was an immediate remainder by deviſe to heir male of body, and held void. And if a leaſe were deviſed "to *A.* for "life, remainder to the firſt iſſue male of *J. S.*" who then has none, the remainder would be void; for to make *Manning's Caſe (e)* law, they were forced to make the ſecond deviſe firſt, and thereupon it was a preſent deviſe to a perſon *in eſſe*, and ſo good; which would be otherwiſe if a deviſee of a remainder were not *in eſſe*; and the ſecond, *Chief Juſtice* HALE and BRIDGMAN held, that a deviſe of a term's truſt by preſent words to one not *in eſſe* would not be good; and the caſe of *Cotton v. Heath* was in chancery; and what A CHANCELLOR decrees in caſe of a truſt of a term is no rule for us to walk by; and the caſe of *Snow v. Cutler* was a deviſe "to wife for life, remainder to the heirs of *J. S.*" and the Court held, that it would be void, as to remainder, if there had been no eſtate for life; but whether that would alter it, they were divided. Our caſe cannot be thought a future deviſe, becauſe the words are *de præſenti*, "I give and bequeath;" and though it appear by the will the poſſeſſion was future, yet the freehold * [285] * is preſent. See *Wild's Caſe (f)*, deviſe "to a man and his "children," if there be no children in being they cannot take as ſoon as they are born; becauſe the words are preſent, and they not *in eſſe*. And they cannot take by way of remainder, becauſe the

Deviſe to the firſt iſſue of *A.* (being after a precedent term) not good by way of executory deviſe.

(*a*) 2. Mod. 8. Finch Chan. Rep. 155.
(*b*) 1. Eq. Abr. 191. 3. Chan. Caſes, 29. Pollexf. 26.
(*c*) Ante, 52. 4. Mod. 255. Salk. 226. Holt, 227. Comb. 254. Skin. 408. 1. Ld. Ray. 3.
(*d*) 2. Vent. 90.
(*e*) 8. Co. 94.
(*f*) 6. Co. 16. S. C. Moor, 368. S. C. 1. Eq. Abr. 181.

rds are preſent. The caſe of *Skelton v. Wright (a)*, deviſe to one *et liberis procreat. et procreand.*" was adjudged a future viſe; becauſe that appeared to be the intention of the feoffor, the word "*procreandis.*" If the deviſe, in our caſe, were "to *Serjeant* ——— for eleven years, the remainder to the firſt iſſue *George Jakes*," I would perhaps conſtrue it as an executory viſe; and make it good, if *George Jakes* ſhould have iſſue during eleven years, otherwiſe not; and that is according to the caſe *Bates v. Amerſt (b)*; for as a marriage of one of the daughters h a *Norton* would not be good after the fifteen years, ſo here, iſſue born after the eleven years ſhould not take; and if the iſe had been "to the firſt iſſue to be begotten of *George Jakes*," n I would give it to any iſſue born during the life of *George kes*, but would not extend it to a poſthumous ſon. But it is ected from the bar by *Serjeant* LUTWICH, that though this deviſe re void as "to the iſſue of *George Jakes*," yet it could not be d "to the ſon of *George Convoy*," becauſe it depended on a cedent condition, *viz.* "if iſſue of *George Jakes* ſhould refuſe o aſſume the name of *Edge*, or die without iſſue;" which are oſſible, *George Jakes* dying without iſſue; *vide Plowd.* 272. *Inſt.* 218. though the condition there became impoſſible by act the party himſelf; and this notion was agreed to by the whole urt. But here it was adjudged not to be a precedent condition, t part of a limitation of a deviſe of a particular eſtate, which is id; but if it were collateral by itſelf, it would be a precedent ndition. *Vide* 9. *Hen.* 6. *pl.* 34. 39. *f.* 16. where on a deviſe *to a n*, with remainder over, he in remainder ſhall take immedi- ly, becauſe a deviſe "to a monk" is void; but if it were, that er the death of the monk it ſhould remain, it ſhould not take l after the death of the monk; *vide Lord Paget's Caſe.* In *Edw.* 3. 19. *A.* ſeiſed in fee made a gift in tail, and if the donee ed without iſſue, it ſhould revert to the donor for life, remainder er in fee; and it was adjudged, that the reverſion to himſelf for e was void, and by conſequence it ſhould remain over immeately; and in our caſe, the deviſe being void, whatever depends it will be void. And upon the whole matter, this is but a deviſe for eleven years, remainder to the iſſue of *George Convoy* en in being.

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Ray 113.

Deviſe to one for life, who is incapable of taking, remainder over, he in remainder takes immediately.

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NEVILLE, *Juſtice*, argued briefly, and agreeing with POWELL, *ſtice*, in the main touched upon the two great rules in conſtruction of wills: FIRST, To maintain the intent of the deviſor, ere it plainly appeared in the will, and conſiſted with the rules law. SECONDLY, That if it be a preſent deviſe, there be one in ing capable of taking at the death of the deviſor; and that this s plainly a preſent deviſe to the iſſue of *George Jakes*, and there- e void, there being none *in eſſe*; and then the ſecond clauſe "to he iſſue of *George Convoy*" is good, according to 11. *Hen.* 6. 7. a

(a) (b) 1. Eq. Abr. 212. Raym. 82.

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deviſe to a monk, remainder over, he in remainder ſhall take preſently, though there is a poſſibility the monk ſhould be deraigned. *Fuller v. Fuller (a)*, and *Taylor v. Bidolph (b)*, a deviſe to ſon and heirs, until ſon ſhould come to twenty-one years, and then to ſon and his heirs, it was reſolved that the fee was immediately in the ſon. And as to "proviſo," it is ſometimes a condition, ſometimes a limitation, and ſometimes a covenant. 1. *Inſt.* 203. 1. *Co.* 209. It is here a limitation. And he concluded for the defendant.

TREBY, *Chief Juſtice*. Theſe and ſuch like eſtates are againſt the antient common law; and therefore it may be ſaid of them as my LORD COKE ſaid of the ſtatute *De Donis*, that ſince they have crept into the law, they have occaſioned great confuſion and diſorder. And he ſaid, that here the iſſue of *George Jakes* could not take preſently, becauſe not in being; nor futurely by way of executory deviſe, becauſe the deviſe is *in verbis de preſenti*; and therefore he could not take at all, and then the ſecond deviſe is good: And he laid no ſtreſs upon the leaſe of eleven years; for he ſaid a ſon might be born within them, and he might not; but he ſaid, that if the deviſe had been, that two years after the eleven years the iſſue of *George Jakes* ſhould take, it would be a plain executory deviſe; for the words then would plainly ſhew it deſigned futurely. But where, by the words of the will, it appears a preſent deviſe was intended, it ought not to be rather conſtrued an executory one, than the will ſhould be fruſtrated; and for that deviſe to right heirs of *J. S.* who is in full life, ſhall not be made good. Antient Books generally ran, that a deviſe "to *Eliz.* "*in ventre ſa mere*" is void; but I think we muſt allow ſuch a deviſe to be good now (*c*); for otherwiſe many wills would be deſtroyed, which would be inconvenient; and ſurely there is no difference between ſaying, "I give my land to the child my wife
[287] "goes with," and "to the child my wife ſhall have." As to *executory deviſes*, they were utterly unknown to the common law; have obtained with much ado; and now that they have prevailed, ought to be looked upon with much jealouſy, leſt they run to a perpetuity: and a perpetuity is ſuch a condition of a fee, that the fee ſhall not be able to give abſolutely to another. It was a great policy of the common law, that alienations ſhould be encouraged; for it is the greateſt preſerver and promoter of induſtry, trade, arms, and ſtudy; and this was viſible from the making of the ſtatute *De Donis*, until common recoveries were found out; and theſe executory deviſes had not been long countenanced when the Judges repented them; and if it were to be done again, it would never prevail; and therefore there are bounds ſet to them, *viz.* a life or lives in being; and further they ſhall never go, by my conſent, at law, let chancery do as they pleaſe. In

(*a*) 1. E. Abr 215. 407. Cro. Eliz. 422 Moor, 353. Godolphin, 57.

(*b*) 2 Mod. 289. 1. Eq. Abr. 188. 2. Eq. Abr. 735. 1. Freem. 243.

(*c*) See Goodright v. Wright, 1. Str. 5. Chapman v. Briſſet, Caſes T. T. 145. 150. Doe v. Carleton, 1. Wil. 225. Harris v. Barnes, 4. Burr. 2157.

Pigg.

p. 6. the Court would not preſcribe them any ſet number of urs, but that they ſhould not exceed a life or lives in being (*a*). t I will not ſay but an executory deviſe may well be "to the right heirs of *J. S.*" In *Cro. Jac.* 459. *Pal.* 335. 1. *Jones*, . a limitation of a leaſe "to *A.* for life, and if ſhe die without iſſue living at the time of her death, then to *B.*" adjudged id. And CROKE ſays *Manning's Caſe* (*b*) would not hold now. *Rol. Ab.* 612, 613. 1. *Sid.* 37. If *Manning's Caſe* were to judged now, it would be hard to maintain it. *Ray.* 493. tting bounds to them now is like a correction of the Judges that ve them countenance firſt. And ſo ſays HALES, 3. *Keb.* 178. 3. A contingency ought not to exceed one or two lives, for it is a reaſonable extent; but here it is to a ſon which perhaps uld not be born in forty or one hundred years. In *Carter*, 87. . a deviſe "to *an infant in ventre ſa mere*" is good, but void to ſon; and that, as far as the Book is an authority, is in point. In y, 43. a deviſe to *A.* for life, remainder to firſt ſon; deviſee s leaving wife *enſeint*; the inheritance deſcends, and veſts in heir of the deviſor; and deveſting of eſtates is not favoured in v: And in executory deviſes the contingency muſt happen ring particular eſtate, or never. The caſe of *Coſton v. Heath* (*c*) is a truſt in chancery, where they carry thoſe things farther an at law.—HE HELD the proviſo to be *a limitation* and no *ndition*, and therefore the firſt deviſe being void, the ſecond ſhall nd (*d*); as if a grant be to two, one whereof is capable, and the her not, he that is capable ſhall take all: So where they are to e at divers times; as a grant to a father, and ſon not in being, e father ſhall take all. 1. *Co.* 100, 101. Eſtate for life deviſed to one incapable, remainder over is good. 1. *Leo.* 195. *vel* 125. leaſe for life to a perſon not in being, and a leaſe to another to mmence from determination of the firſt term, commences preſently. *Holcroft's Caſe* (*e*) is in point.

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Judgment was given for the defendant (*f*).

(*a*) See Forteſ. Rep. 232. 2. Bl. 173, 174. 2. Brown Caſes Chan.

(*b*) 8. Co. 94.

(*c*) 1. Eq. Abr. 191. 3. Chan Caſes, Pollexf. 26.

(*d*) See Napier v. Saunders, Hutt. 119. yn v. Ward, 1. Vezey, 420. Leuſſier v. Tracy, 3. Atk. 774. Stat- v. Bell, Cowp. 40. Bradford v. Foley, Dougl. 63. Horton v. Whitaker, 1. Term Rep. 346. Doe v. Brabant, 3. Brown Chan. Rep. 393. 4. Term Rep. 706.

(*e*) Moor, 486. 520. S. C. 4. Co. 30.

(*f*) See Fonnereau v. Fonnereau, Dougl. 504. and Doe v. Brabant, 3. Brown Chan. Caſes, 393. Andrews v. Fulham, 2. Stra. 1092.

EASTER TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 489.

Cage *againſt* Acton.

A bond given by a man to a woman, in conſideration of their intermarriage, conditioned, that if ſhe ſurvived him he would leave her ſuch a ſum of money, is only *ſuſpended*, but not *extinguiſhed*, by the intermarriage; and ſuch a bond, and no aſſets *ultra*, may be pleaded in bar to an action againſt the obligor, as adminiſtratrix, for rent arrear on a demiſe by deed; for they are in equal degree.—S. C. 1. Bac. Abr. 291. S. C. Carth. 511. S. C. Salk. 325. S. C. Lilly Ent. 213. S. C. Holt, 309. S. C. 1. Ld. Ray. 515. S. C. Comy. Rep. 67. Prec. Chan. 137. 2. Vern. 480. 2. Peer. Wms. 243. 5. Term Rep. 561.

DEBT againſt the defendant, as adminiſtratrix to her huſband, for arrears of rent upon a leaſe made to him in his life-time.

The defendant pleaded, that before the intermarriage between him and her there was a bond entered into by him to her to pay ſo much money to her, her executors, adminiſtrators, or aſſigns, upon condition that, in caſe ſhe ſhould ſurvive him, he would leave her worth ſo much money; that he had not performed the condition; that ſhe had not aſſets above two hundred pounds, which was a leſs ſum than that which he had bound himſelf to pay her; and that ſhe retained that in part. Upon which the plaintiff demurred generally.

The points in this caſe were two:

FIRST, Whether debt upon a bond is of as high a nature as rent, ſo that an executor might give it preference of payment?

SECONDLY, Whether the ſubſequent marriage were a releaſe of the bond?

This

his caſe was argued at the Bar twice; firſt by BROTHERICK *for the plaintiff* and CARTHEW *for the defendant*; and afterwards Serjeant LEVINZ *for the defendant*, and ——— *for the plain-*

Cage against Acton.

ut THE COURT, *viz.* HOLT, *Chief Juſtice*, ROKEBY, RTON, and GOULD, *Juſtices*, agreed clearly, that rent, whe- upon a parol or leaſe by deed, was in equal degree to bond, that the executor might prefer whom he pleaſed.

ut THE SECOND POINT being more doubtful,

ROTHERICK *for the plaintiff* ſaid, and laid it down for a rule, if a perſonal action or duty be once extinct, it ever is ſo; and efore they cannot be releaſed upon a condition ſubſequent. *o. Ab.* 412, 413. And though here this duty was not *ſolvendum n futuro*, and on a contingency, *viz.* if the wife ſurvived, yet ien was preſent; and if this were a bond by a ſtranger to the , the huſband after marriage might have releaſed; and it were then that he ſhould have power to releaſe to another and not imſelf; and the diſcharge depends upon the duty, and not on emedy for it; and the huſband has a more abſolute power on a to his wife than on an action for it; for if a bond be made to fe before * marriage, the huſband cannot ſue for it without the * [289] , yet he may releaſe it without her: and that every obligation tes a preſent duty appears by the forms of pleading; and ation and condition are not one deed, but the one is in a man- ubſequent to the other; and therefore when you crave *oyer* of obligation, the condition is not ſet forth, but you muſt crave thereof ſeparately. 3. *Cro.* 580. 5. *Co.* 70. are in point; f I covenant to infeoff you before *Michaelmas*, a releaſe of all ns before *Michaelmas* diſcharges not the covenant; but if I myſelf in a bond for performance thereof, there is an immedi- luty releaſable immediately; but if marriage did not releaſe it ur caſe, the conſequence would be abſurd that there ſhould be mmediate duty unreleaſable during the coverture. 2. *Leo.* 20. writ be ſued out before the day of payment, and that day incurs rejudgment, the writ is good, becauſe there was a duty at the of the purchaſe of the writ; and he ſaid, *Yelv.* 156. and *Hob.* were rather for him than againſt him, and that *Godbolt*, 271. t. 17. and *Noy*, 26. came neareſt to the caſe; and he quoted oll. *Rep.* 134. in point for him.

ARTHEW agreed, that regularly there is in every obligation a nt duty; but that, he ſaid, was to be underſtood when the *ndum* was to be on a certain fixed time, and not upon a con- ncy; for then he would have it a mere poſſibility, which in ature is not releaſable: and he ſaid, that whether the condition n obligation be precedent or ſubſequent, both made but one ; as if *A.* covenant with *B.* to pay *B.* ten pounds if *B.* do a thing; and *B* brings covenant, and pleads only what is for urpoſe, the reſt muſt come of the other ſide; and one can

crave

LACE *againſt* ACTON.

crave *oyer* of nothing but what is part of the ſame deed; for if there be a defeaſance in another deed, you muſt produce it in court, which proves the condition and obligation to be but one deed; and where there is a preſent duty, marriage is a releaſe of it; otherwiſe when the duty is to ariſe upon a contingency, as here; a promiſe, if it be put in writing, is a covenant; indeed a bond does ſound in duty, and therefore this writing deſerves more the name of a covenant than that of bond; and he ſeemed to rely much on the caſe of *Lupart v. Hoblin* (*a*).

Afterwards, in *Michaelmas Term*, in the eleventh year of *William the Third*, ROKEBY, *Juſtice*, being dead, THE COURT argued *ſeriatim*;

GOULD and TURTON, *Juſtices*, for the defendant, that the marriage did not releaſe the bond:

HOLT, *Chief Juſtice*, *totis viribus contra*, and that it was clearly a releaſe.

* [290] * GOULD, *Juſtice*. Marriage clearly is a releaſe of all bonds and ſpecialties, whether contingent or not, which by any poſſibility may become payable during the marriage, becauſe huſband and wife are but one perſon in law, and ſo there can be no payment between them; and alſo becauſe the ſuit is once ſuſpended; and then it ſhall ever be ſo. 11. *Hen.* 7. *pl.* 15. 19. *Hen.* 7. 1. *Inſt.* 264. *Dy.* 141. But the great objection is, How this bond ſhall ſubſiſt, there being now nobody to whom it is due, and every obligation is *debitum in præſenti*; and a huſband's owing a thing to his wife is owing a thing to himſelf, which is abſurd. To this I anſwer, that the law very often makes a fiction for the preſervation of a right; and a ſuſpenſion of a perſonal duty is not always an extinguiſhment. *Litt. ſect.* 646, 647. This is a neceſſary and prudent proviſion in caſe of ſurvivorſhip; and it were hard that marriage ſhould deſtroy that whereof it was the cauſe. The rule is, that *modus et conventio vincunt legem*. The law, by its own operation, will do no wrong; and ſurely it would be a great wrong to defeat the wife of her proviſion. 1. *Inſt.* 264. 8. *Co.* 136. If a *feme executrix* take debtor to huſband, it is no releaſe of the debt, becauſe it would be a *devaſtavit*; and here the law will interpoſe and take away the inconſiſtency of the debtor and debtee between huſband and wife, by taking it into its own cuſtody: and he quoted the caſe of *Dorcheſter v. Web* (*b*): A man obligor marries a woman obligee, who are afterwards divorced, the debt revives, and the man ſhall be ſued by the woman again; and though here there be a *debitum in præſenti*, yet it is a qualified *debitum*, and is no more than a proviſion in caſe of chattel, which the law would make in caſe of inheritance. In the caſe of *Smith v. Stafford* (*c*), though it was urged to be a preſent promiſe and

(*a*) 2. Sid. 58.

(*b*) Cro. Car. 372. S. C. 1. Jones, 345. S. C. Hutton, 128. S. C. Godolph. 106. 235 — See alſo the Year-Book 27. *Hen.* 8. f. 7. b.

(*c*) Hobart, 216. S. C. Hutton, 17. S. C. 1. Brownl. 18. S. C. Noy, 98. S. C. Goldſ. 21.—See alſo Cro. Jac. 571.

Left

CAGE *againſt* ACTON.

ſable by the wife, yet judgment was, that ſuch promiſe releaſed by the marriage, againſt the opinion of *Hobart*; he juſtice of the law will preſerve this debt for an honeſt In *Noy* it is ſaid, it would be otherwiſe in a bond; *quod ſſum*; but that is not ſaid in any of the other Books that ; and I ſee no difference. The law will not work a releaſe to the intent of the parties; and in *Litt. Reports* it is ſaid, riage is only a ſuſpenſion.

TON, *Juſtice.* This bond was not entered into for any lebt or duty; if it had, it had been extinguiſhed by the ; for as bonds given by others to the wife are by marriage and releaſable by the huſband, ſo * bonds which ſhe has * [291] huſband are veſted in him, and ſo releaſed by act in law. 264. *Dy.* 6, 7. 140. 1. *Ro. Ab.* 184. 8. *Co.* 186. . *Cro. Car.* 333, *&c.* And it is a rule in law, that re- law are more mildly taken againſt the releaſer than re- deed. 1. *Inſt.* 264, 265. And it is unnatural that mar- ould be a releaſe of that which was made by reaſon of the . If a debtee make a debtor executor, it is a releaſe of the ut if a *feme* executrix take her debtor to huſband, that is ſpenſion of the action, and the duty remains. *Plow.* 184. . 1. *Inſt.* 264. 1. *Ro. Ab.* 194. *Hob.* 10. *Mo.* 855. and ſon bound to *A.* jointly and ſeverally, *A.* makes the ſe executrix, and held that was only a ſuſpenſion. And he d a bond to a covenant or promiſe, for no action can be on any of them till broke; and promiſe is not releaſed by e, *ideo nec* bond; and he quoted *Dy.* 51. *Litt. Rep.* s *Caſe.* Objection, That though ſtatute be of a higher it is no *devaſtavit* to pay the bond before it, becauſe it is till broke. *Vide Mo.* 752. 5. *Co.* 28.

r, *Chief Juſtice, contra.* There are two queſtions in :

r, Whether *rent* be of equal degree with *a bond*, or of ature than a bond? and, If payment of debt upon a bond pleaded in bar of debt for rent? A caſe out of 2. *Vent.* ted at THE BAR to prove rent of a higher nature than a but I hold them to be of equal degree; for if it be a leaſe , it is in the realty, and that is in equal degree with a d payment of one by executor is a good plea in bar of the and the caſe of *Newport v. Godfrey (a)* does not contradict was debt for rent upon a parol leaſe; the defendant pleaded ebt upon obligation, *ultra quod* he had not aſſets; for being *li gradu*, he could not plead the one againſt the other till t or payment of the money; but otherwiſe if one of them higher nature than the other; and there is no diverſity i debt in the realty by ſpecialty and in realty without ſpe- s to equality of degrees; ſo that if there were no more in , the plea would be a good plea.

1. Sid. 210. Arte, 7.

Vide 1. Lev. 281. *et quære de hoc, v.* 3. Lev. 214, 215. *acc.*

(*a*) 3. Lev. 267. 4. Mod. 44. 2. Vent. 184.

But

CAGE *against* ACTON.

But THE OTHER POINT is a great and conſiderable one, viz. Whether the bond be not extinguiſhed by the marriage, though given in conſideration of the marriage? AND I HOLD the bond to be extinguiſhed by the marriage, and that the bond was a preſent immediate duty from the ſealing and delivery of it; and though it is qualified, that is, though no action can be brought upon it till after
* [292] the death of the huſband, * a releaſe of "all actions" or "all debts" will releaſe it (*a*); and *Coke* in his Comment ſays, a releaſe of all actions will diſcharge it, though no action can be brought upon it at that time, becauſe it was a thing in action, and without all diſpute a preſent debt; and though it be payable upon condition, yet it is a preſent duty; and it being a ſubſequent condition, it muſt have relation to ſome antecedent, which is the preſent duty. In 5. *Co.* 70. diverſity between a condition ſubſequent and a condition precedent; for a releaſe of all demands will not releaſe a debt upon a condition precedent, but will upon a condition ſubſequent; and to ſay that it is not a precedent debt is directly againſt the words of the agreement, for he is to pay ſo much preſently; and then comes the condition, and does not ſuſpend the debt, but only adds a condition with it: and when you come to declare upon this bond, you do it plainly, without any mention of the condition; but if the condition were precedent, you muſt ſet it out in pleading, becauſe you muſt ſhew it performed, without which you have not a
Vide Hob. 217. title; and though they demand *oyer* of the condition, and have it entered of record, by which it is part of the record, yet that does not alter the plaintiff's declaration; for if the defendant do not ſhew the condition performed, or not broke, or plead a ſufficient plea, the plaintiff ſhall have judgment without taking any notice of the condition. So upon *oyer* of it, if it do not appear to the Court whether the condition be broke or not, the plaintiff ſhall have judgment; but if it do appear to the Court that the condition is broke, or not broke, they ſhall give judgment as the condition ſhall direct; that is, if it be for the doing of a thing which is not done, and that appears to the Court, the plaintiff ſhall have judgment; or if it be for not doing a thing which is not done, the defendant ſhall have judgment. So it is plain here is a preſent duty. *Vide* 11. *Hen.* 4. 43. If an obligor pay a debt in a bond without taking advantage of the condition, it is a good payment: ſo if it be a debt in the preſent, he may pay it before the day of payment in the condition; and marriage is an actual payment of the money, for by the marriage the bond is given to the huſband, and then he himſelf is to pay it, and is the perſon to whom it is to be paid, and none can pay or do other act to himſelf; and if a ſtranger had made a bond to the *feme* that the huſband would leave her worth ſo much money, the huſband might releaſe it. *Ca.* 264. *Plow.* 185, 186. and *Arundel's Caſe*; and the Books make no diſtinction, *et ubi lex non* * *diſtinguit nec nos diſtinguere debemus*:
* [293] and I ſee no grounds of diſtinction, beſides my not finding it in any Books: and ſuppoſe there had been a defeaſance of this bond,

(*a*) See Litt. ſect. 512.

and

n intermarriage, ſurely that would diſcharge the bond; 1 a condition be on record, that will make no difference, efendant muſt plead performance of it. The caſe executor of the obligee marries the obligor is different, re divers rights; but where the obligee marries the iere he is to receive money to his own uſe. If a man if a term in right of his wife purchaſe the inheritance, n extinguiſhment, becauſe of divers rights; and the f right is a good ground for diverſity in law. 1. *Inſt.* 9. 136. Another reaſon is, that ſuch releaſe would work 1 prejudice to a third perſon. Tenant for life grants a hen ſurrenders; yet rent ſhall continue during his life. ring rent in fee confeſſes a ſtatute, and then releaſes the t ſhall have exiſtence as to the conuſee: And upon the n is the caſe of the marriage of the executor of the the obligor: and if the obligor pay money to the *feme* of the obligee, and after marry her, the law does not ft of it to the huſband, but he ſhall have it liable to all ınd legacies of the teſtator. Now a bond is not ſupported ng but itſelf; and here it is not the marriage that is the on of it, for it needs none, being ſufficient of itſelf; : of a promiſe the marriage is the conſideration, and the on is what ſupports the promiſe. I grant the law 10 wrong to a third perſon; but here the marriage is the that is prejudiced by it, and therefore it cannot be wrong to her. In the caſe of divorce put, there it was ge at all *ab initio*; and if huſband and wife made it of lands of the wife, and were afterwards divorced, ſcontinuance; for between themſelves relation made a it never as to a third perſon *Hob.* 10. A perſonal e ſuſpended is ever gone. And though the condition ent, yet the obligation is abſolute; and the marriage is f the obligation, and not of the condition; and a releaſe tion is not a releaſe of the obligation. Now as to the quoted by my Brothers, a man promiſes to leave his 1 one thouſand pounds in caſe ſhe ſurvived him, a ſubſe- riage does not diſcharge that promiſe; and the law is ſo, inſt the opinion of * *Hobart*; but in the caſe of a pro- * [294] is nothing due to the wife till after the death of the nd may be there never will be anything due to her. ing doth not make law, but on the contrary pleading conformable to law, and is good evidence of the in caſe of a bond a duty ariſes immediately, and is ſible upon a condition ſubſequent; but upon the does not ariſe until after the death of the huſband. e, there is no difference in this reſpect between a ıd a ſpecialty, if they be made in the ſame manner; be a covenant to leave a wife worth ſo much money if : him, that ſhall not be diſcharged by marriage; and a ll demands is not a releaſe of a covenant until it be broke, ıtil then it does not lie in demand. If a promiſe had been by

CARR *againſt* ACTON.

by a ſtranger to a wife, that the huſband, in caſe ſhe ſurvived him, would leave her ſo much; or if a ſtranger had covenanted ſo, after marriage, the huſband could not releaſe ſuch promiſe or covenant; for the rule is, anything that may accrue to the wife during marriage the huſband may releaſe; and ſuch releaſe will be good, though the thing do not fall during the marriage (*a*). As if a devise be of a leaſe to *feme*, after the death of *J. S.*; though the huſband has nothing in the leaſe till after the death of *J. S.* yet he may releaſe it, becauſe it may fall in poſſeſſion during the marriage. The caſe of *Belchier v. Hodgſon*, in *Yelverton* (*b*), is not very good ſenſe, and is much better in *Cro. Jac.* 222.; and the reaſon of a reſolution is more to be conſidered than the reſolution itſelf: and though the intent of the parties were, that the marriage ſhould not releaſe this obligation, yet that ſhall never alter the rule of law; nor is it fit the law ſhould be ſtrained or trodden down to ſupport the intent of *lay gens*, when they take a wrong way of agreement inconſiſtent with it. And he ſaid, that even chancery would not give relief in this caſe, though it may be thought much more proper for equity than law: and he quoted the caſe of *Darcy v. Chute* (*c*): A woman had ſeven hundred pounds a-year, and by writing with an intended huſband it was agreed between them, that ſhe ſhould take the profits of it until her death, and, after marriage, the huſband took all the profit, contrary to the agreement; and upon this a bill was brought in chancery, but they would not relieve contrary to the rule of law.

Vide Caſes in Chan. 1ſt Part, 218.

* [295]

This caſe went afterwards into chancery, where relief (*d*) was given, the bond being conſidered as a marriage-agreement (*e*).

(*a*) See the caſe of Clark v. Thompſon, Executor of Iſaac, Cro. Jac. 571.

(*b*) Yelv. 156.

(*c*) 1. Chan. Caſes, 21. 1. Eq. Abr. 63.

(*d*) Judgment was given for the defendant, and afterwards a writ of error was brought, S. C. 1. Ld. Ray. 523. But the plaintiff in error, perceiving the Court above inclined to affirm the judgment, did not proceed, S. C. Carth. 513. *Sed quære*, If it was not affirmed? 5 Term Rep. 337. The arguments of GOULD and TURTON, *Juſtices*, in this caſe have been approved of and confirmed by a recent determination in the court of king's bench, in which it was decided, "that a "bond conditioned for the payment of "money after the obligor's death, "made to a woman in contemplation of "the obligor's marrying her, and in"tended for her benefit if ſhe ſhould "ſurvive, is not releaſed by the mar"riage." Milbourne v. Ewart and Others, Michaelmas Term, 34. Geo. 3. 5. Term Rep. 381 to 387.

(*e*) See the caſe of Cotton v. Cotton, Prec. Chan. 41. S. C. 2. Vern. 136. S. C. 2. Chan. Rep. 158. Acton v. Acton, Prec. Chan. 237. S. C. 2. Vern. 480. Carrel v. Buckle, 2. Peer. Wms. 243. Watkins v. Watkins, 2. Atk. 97. Tyrill v. Hope, 2. Atk. 58. Beard v. Beard, 3. Atk. 72.

Caſe 490. Carrill *againſt* Cockran.

The defendant ordered to put in ſpecial bail on a ſpecial *aſſumpſit* for money won at play.

See Holt, 85.

THE QUESTION, upon motion, was, Whether they would bail the defendant to ſpecial bail, in a ſpecial *aſſumpſit*, for money won at play?

TURTON and GOULD, *Juſtices*, ſeemed to incline they ſhould not give him better ſecurity than he was willing to take at firſt.

But HOLT, *Chief Juſtice*, ſaid, they never ought to enter into the merits of a cauſe upon a queſtion about bail; for to order com-

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CARRILL *againſt* COCKRAN.

il upon merits would ſlur a man's cauſe of action; and no ight to have his cauſe tried with diſparagement upon it; ugh this may be for money won at play, yet it was a lawful t which the act of parliament allowed of; and no man ought wiſer than the law; and this was giving money againſt , for which *indebitatus aſſumpſit* would not lie (*a*), but an upon *the ſpecial contract*; and to ſay, that becauſe he depended he defendant's word at firſt, he, therefore, ſhould have no bail, would be a reaſon why there ſhould be no ſpecial bail ſimple contract.

here *ſpecial bail* was ordered; and it was ſaid to be ſo l in like caſes in the common pleas.

(*a*) See Walker v. Walker, ante, 258.

MICHAELMAS TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir Thomas Rokeby, *Knt.*
Sir John Turton, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 491.

Memorandum.

SIR THOMAS ROKEBY, *Knight*, died on the twenty-ſixth of *November* in this Term after a long illneſs.

* [296]

Caſe 492.

* Fiſher *againſt* Wiggs.

If a copyholder ſeiſed of cuſtomary lands in fee at the will of the lord ſurrender them "to the "uſe of his "wife for life, "and after her "deceaſe to the "uſe of *A. B.* "*C. D.* and *E.* "for ever," the children take a *tenancy in common*, for the words would be ſo conſtrued in a will, and a *ſurrender* ſhall have the ſame conſtruction as a *will* (*a*); but ſuch words in a *deed* would make a jointenancy.—S. C. Comy. Rep. 88. 3 C. 1. Ld. Ray. 622. S. C. 1. Salk. 391. S. C. 3. Salk. 206. S. C. Holt, 369. S. C. Lilly Ent. 205. S. C. 1. Peer. Wms. 14. S. C. 2. Eq. Abr. 58. Litt. Rep. 346. 2 Vezey, 252. 3. Atk. 731. 1. Wilſ. 341. Sayer, 67. 71. Cowp. 660. Co. Lit 190. 2. Bl. Com. 194.

A SEISED of a copyhold eſtate in fee ſurrendered it "to the "uſe of the wife for her life, the remainder to his five children, equally to be divided between them and their reſpective "heirs for ever."

THE QUESTION was, Whether this was *a jointenancy or a tenancy in common?*

CARTHEW would have it a tenancy in common; for it being a ſurrender to uſe, it would receive the ſame conſtruction with a

(*a*) See the caſe of Idle v. Cook, 2. Salk. 620.

FISHER against WIGGS.

mmon law, which is not to be compared to a grant by more to a will; in which clearly this would be a tenancy on; and the reaſon is, becauſe the intent is apparently ſo; aw will conſtrue wills according to the intent, if conſiſt- the rules of law; and it ought to be ſo in like manner in of uſes, which were dirigible and governed by equity, and :uted by the ſtatute, as chancery would have done before; y a court of equity would conſider a uſe at common law, if in this manner, to be in common, and not joint; and for ig the intent of the parties he quoted *Lit. ſect.* 296. 298. 2. *Leo.* 72. 3. *Co.* 37. *Litt. Rep.* 46, 47. *Cro. Car.* *Leo.* 257. *Cro. Eliz.* 695, 696.

HEY, ſince Attorney-General, *contra*. The ſurrender yhold eſtate is a perfect grant, and to be pleaded as ſuch, fore to be conſtrued like other grants (*a*). There is no e between "ſurrender" and "grant (*b*)." Surrender t are the ſame (*c*). So the words "equally to be divided" all be void; and the law favours jointenancy more than * [297] n common; the one preſerving the eſtate enti e, a thing lelights in, and the other diſmembering it, which the law and for this reaſon it is that the eldeſt ſon runs away with d where a thing is given by joint words, it ſhall not be nmon, without expreſs words that make an abſolute divi- : an intent that they ſhall be divided will not do. A man hree acres of land to three (*a*), which is a joint eſtate; , in the ſame deed, covenants with them *et quolibet eorum*, ould ſeem to ſhew his intent to have been that they ſhould :ral eſtates, in reſpect whereof he made a ſeveral covenant; notion was rejected. And the diverſity is manifeſt between d a will; for in a will the teſtator, who is ſuppoſed to be of counſel, has his manifeſt intent ſupported by conſtruc- y advice of counſel he could have legally done it; but o reaſon for ſuch favour in the caſe of a deed, where the ight have taken advice. If lands be given to two, one moiety to the one and the other moiety to the other, *habendum* makes an actual diviſion; and nothing divides cy in a grant but what does it actually by the very words "Equally to be divided," in a will, was holden to be no n common (*e*); which caſe, though in truth not law, :ws how tender the Judges were of ſevering a jointure. 1. "Equally to be divided" makes a tenancy in common but not in a grant. 2. *Roll. Abr.* 90. and the caſe of *Everard* (*f*).

o. 366. Jones, 340.
am, 39.
ulit. 272. Cro. Jac. 376.
9.
. 19.

(*c*) 3. Cro. 330.
(*f*) Ante, 227. Comb. 329. Carth. 340. Salk. 390. 5. Mod. 25. Holt, 368. 1. Ld. Ray. 422.

Surrender of a copyhold is a grant, and to be ſo pleaded.

HOLT, *Chief Juſtice.* There is no difference in a grant between giving lands "to five and their heirs" and "to five and "their heirs reſpectively," or "to five and their reſpective heirs." And without doubt a ſurrender of a copyhold is a grant, and to be pleaded as ſuch.

This was again argued.

And to have it a *tenancy in common*, the rule in *Hob.* 277. that Judges ought to be curious and *aſtute* to find a means to ſupport the intent of parties; which often makes Judges, in conſtruction, tranſpoſe clauſes in deeds, and ſplit an inſtant into priority and poſteriority, and never adjudge without reluctancy againſt the intent of parties, eſpecially in intended proviſions for children; and "equally divided" and "to be divided" are the ſame; and here it cannot be equally divided to them and their heirs, if it be made a jointenancy. *Vide Style*, 434. where POPHAM's opinion is cited, [298] that in conſtruction of tenancy * in common the ſubject matter is to be conſidered; and though ſtrict rules of law ought not to be receded from in the creating of eſtates, yet it is not ſo in qualifying an eſtate created. *Vide Hob.* 172. *Litt.* 298. A *ſcilicet* qualifies an eſtate of jointenancy into a tenancy in common, and the ſubſtance of the premiſes is not hereby altered; and tenants in common have each of them the land to his uſe, as well as in caſe of jointenants; and if a *ſcilicet* or *viz.* which is called *clauſula auxiliaris*, make a jointenancy into tenancy in common, *à fortiori* "equally to be divided to them and their reſpective heirs" will do it; and there is not any ſet form of words neceſſary to make a tenancy in common. *Litt. ſect.* 298. If the words here were, "each to have a fifth part," it would do; and "equally to be "divided" and "each to have a fifth part" is the ſame in ſubſtance, though the words be different. It is true, as is objected, that the firſt words are joint, but they make a jointenancy only by implication, which is controllable by ſubſequent expreſs words; as where lands are given generally, that implication of an eſtate for life may be enlarged into a fee, or abridged into a chattel, by ſubſequent expreſs words. So if lands be given to two, *habendum* to one for life, the remainder to the other for life, *Dyer*, 12. *Cro. Eliz.* 759. *Moor*, 667. *Owen*, 167. *J. S.* by deed acknowledged to have received twenty pounds to the uſe of *A.* and *B.* equally to be divided; *A.* dies, his adminiſtrator brings an action for a moiety, and had judgment, becauſe of the words "equally "to be divided:" a much ſtronger caſe than ours, being of a perſonal thing, harder to be ſevered; for if there be two obligees of a bond, and one of them is attainted, the King ſhall have all; otherwiſe in caſe of lands. *Yelv.* 23. 1. *Brownl.* 82. It was inſiſted upon, that the ſtrict rule of law is not to be adhered to in the caſe of a ſurrender of a copyhold; for there is hardly a more extenſive rule, or ſubject to fewer exceptions, than that a perſon not named in the premiſes ſhall not take *in præſenti*; and yet it does not hold in copyholds. 2. *Roll. Abr.* 67. *Fitz.* 19. *Popb.* 125, 126

A

eaſt copyholds ſhall have the ſame favours as uſes; and the ls in our caſe would make a ſeverance of a freehold, in caſe of at common law. 2. *Vent.* 365. A covenant to ſtand ſeiſed the uſe of *A.* for life, remainder to the uſe of two perſons, ually to be divided;" adjudged the remainder was in com-

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Afterwards in *Hilary Term* THE COURT argued *ſeriatim.* * [299]

OULD and TURTON, *Juſtices*, held it a tenancy in common.

OULD, *Juſtice*, firſt cited the opinion of *Chief Juſtice* RICH-SON in *Beck's Caſe* (*a*), that in the conſtruction of deeds all the ds ought to have their effect, if poſſible; and he ſaid, that he w no authority againſt making theſe words to amount to a rance of the jointure; and therefore to reject them would be nſiſtent with the rules of conſtruction. He confeſſed, that ought to be ſtrict in creating and limiting eſtates; but that is where there are expreſs words or phraſes made neceſſary by law to the creating or limiting of eſtates. But here are no eſs ſet words neceſſary to make a tenancy in common, or a tenancy, but ſuch only as ſhew the intent of the party, which of he deſigned (*b*). So I hold, that any words which manifeſt that eoffor, &c. intended that they ſhould have ſeveral properties will e a *tenancy in common*, for it is neither a creation nor a limitation tate, but a qualification of an eſtate already created and limited; therefore a releaſe from one jointenant to another needs no s of inheritance; and joint premiſes may be ſevered by *ndum*, becauſe it only alters the quality of the eſtate. So if it be apparent how the donor intended to have the eſtate ives qualified, ſuch conſtruction as maintains that qualification t to be put upon his words. If a man deviſe his land "to one nd his heirs" it is a fee; but if he add, "and if he die without eir of his body *A.* ſhall have remainder," this makes it an in-19. *Hen.* 6. 74. *pl* 41. In the caſe of *Bliſſet v. Cranwell* (*c*), A ſe "to two ſons and their heirs, and the longer liver of them, ually to be divided among them after the death of his wife," adjudged a *tenancy in common*, notwithſtanding the expreſs tenancy: and in a will "equally to be divided" and "to be ivided" are the ſame thing; and we are here upon the con-ction of a uſe, which is much to be compared to a will. In *Cell. Abr.* 67. a ſurrender was out of court, and the ſurrenderee a new copy to himſelf alone in the premiſes, "*habendum* to m and his wife;" and though the wife, by common law, ſhould take, being not named in the premiſes, yet this being of a hold eſtate ſhall be good to both; ſo that a ſurrender receives ore favourable conſtruction than a common-law grant. I ot cite a caſe at large that was ſolemnly adjudged, in *r Term*, in the thirty-ſecond year of *Charles the Second*; it

(*a*) 1. Rep. 346.
Litt. ſect. 292.

(*c*) 3. Lev. 373. 1. Salk. 226. Comb. 256.

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was indeed a feoffment in fee "to two and their heirs, * "to be divided between them;" but no judgment entered, all the Judges, except JONES, *Juſtice*, inclined to ma *tenancy in common*; and JONES took the difference betwee and a will. *Coke Litt. (a)* ſays, "if a verdict find that "ſeiſed of a manor *in tres partes dividend.* it is a tenancy in co "*ſecus* if it be *diviſas.*" *Yelverton (b)* has the ſame ca the ſame in *Moore (c)* and *Croke (d)*, that if an intereſt be to three, "equally to be divided," it will be a tenancy in c A grant to two, *habendum* to one for life, remainder to t for life, ſevers the jointure *(e)*: and he ſaid, the authorities him were notional diverſities between a deed and a will; bu this is ſuch a deed as deſerves as favourable a conſtruction a it being a ſurrender to a uſe. As to 2. *Roll. Abr.* 90. and *Sty* where it is ſaid, that "equally to be divided" will not *tenancy in common* in a deed, as in a will, they are but t authority both; and though it were allowed for law, yet it is this, becauſe it was a perfect conveyance at common law, by way of uſe, where we muſt have regard to the intent; words "reſpective heirs" ſhew plainly that he intended t of both ſhould take.

TURTON, *Juſtice*, agreed *in omnibus*; and added, that ders of copyhold eſtates were made in the laſt extremity, as wills, and therefore more eſpecially ought to have t favour; that this is a proviſion for children; that the int manifeſt; and for that reaſon, ſince no ſpecial form of wo neceſſary, they ought to make it a *tenancy in common*; if other reaſons, yet becauſe it is a uſe dirigible by equity be ſtatute, and now executed by the ſtatute, as the *ſubpœn* have ordered it before.

HOLT, *Chief Juſtice*, *contra*. My Brothers go up grounds. THE FIRST is, That in all deeds this would be a in common. AND, SECONDLY, That if it were not ſo in yet it ought to be ſo in this caſe, it being a ſurrender of a c eſtate to a uſe. The caſe they moſt rely upon is the addition of *Poph.* 125. and there it is uncertain whether the wife be Certainly nobody knows the author of that report, and i from *Cro. Jac.* 434. And I hold, againſt that authority, copyholder ſurrender to his lord, declaring no uſe, the co in the lord, and he may new grant it to him; and the grantee in from the lord, and not from the ſurrenderor; and to ſay th render of a copyhold eſtate ſhall be otherwiſe conſtrued than

* [301] to contradict *Coke's Copyhold Caſes*, where it is reſolved, * are to be governed according to the rule of the common law not where a particular cuſtom prevails; and in ſome man is a cuſtom, that if a ſurrender be to three, the firſt named ſ

(a) Co. Lit. 190. b.
(b) Whorewood v. Shaw, Yelv. 23, 24.
(c) Shaw v. Norwood, Moor, 667. n. 914.
(d) Shaw v. Sherwood, Cro
(e) Dyer, 10.

· his life, and ſo of the ſecond, &c. And by the cuſtom of ſuch manors, if the firſt taker ſurrender to the lord, he deſtroys ıe other two eſtates in remainder. And if theſe words, ually to be divided," ſignify anything, they ſignify no more the law would otherwiſe intend, for everyone will have a fifth and no intereſt in the other parts. 1. *Inſt.* 186. *a.* One nant cannot forfeit more than a moiety, though they have a freehold; yet if both of them join in a feoffment, and one of die, the feoffee muſt plead a feoffment by them both. And *ſect.* 262. that jointenants are in by one title, and tenants in non by ſeveral titles. 1. *Inſt.* 189. Jointenants hold by one nd one right; as if lands be given to *J. S.* and *Biſhop of vich*, they are tenants in common, becauſe they have it by al rights, though by one title. But tenants in common have ed ſeveral freeholds and inheritances, but a joint occupation ll as jointenants; and therefore if one tenant in common take e profits, the other has no remedy, no more than one jointe- would have in that caſe againſt his companion; ſo "equally be divided" may go to the poſſeſſion, which is joint in both . As to the addition of the words, "and their heirs reſpec- ely," it is no more than what the precedent words imply if were out: as if lands were given to two and their heirs, it ſhall their heirs reſpectively, that is, be indifferent to go to the of the one or of the other till ſurvivor, and ſo *expreſſio eorum tacitè inſunt nihil operatur.* In *Dr. Drury's Caſe* (*a*), theſe ; "during the term" are rejected, becauſe underſtood if they omitted; for the grant would be the ſame without them; our caſe, it being a jointenancy, it is a conſequence that the or and heirs ſhall have it. It is objected, that *Littleton* (*b*) iat "one moiety to one, and the other moiety to another," a tenancy in common, and diſtributed by one deed. I r, that though it be indeed one deed, yet they are diſtinct yances; and livery to the one, *ſecundum formam chartæ*, will ail the other; and in our caſe here is no diſtribution, for ally to be divided" or "equally divided" is repugnant to a :y in common; but "one moiety to the one, and the other iety to the other," is of a moiety * undivided, and therefore a * [302] :y in common. But if twenty acres be given, *habendum* ten to one and ten acres to the other, the *habendum* is void, be- the diſtribution would be repugnant to the nature of a :y in common, which muſt only be of a moiety, &c. undi- : and, if theſe words could ſignify anything, the parties could ke until diviſion. *Co. Ent.* 413, 414. Moiety or third part *indiviſo*, without diſtinguiſhing jointenancy from tenancy in ion. As to *Co. Litt.* 190. where it is ſaid, that if a verdict find as ſeiſed of two parts to be divided: firſt, It is by way of ems," and conjectural; and ſecondly, It is not at all material to ſe of 21. *Edw.* 4. 21. which is only, that a verdict finding one of *tres partes diviſas* is not to be taken for tenancy in com-

(*a*) 8. Co. 139. (*b*) Litt ſect. 292.

FISHER *against* WIGGS.

mon, but of a ſeveralty; and there is not a word of *dividend*, and therefore no ground for the diſtinction from that Book; and he means of a common poſſeſſion which may be between tenants in common or coparceners. In *Small v. Day* (*a*), deviſe of knight-ſervice land to wife for life, which was void for a third part, and it was enjoyed between her and the heir during her life, and the poſſeſſion was held joint; and that the poſſeſſion of one is the poſſeſſion of the other; and that though tenants in common have ſeveral freeholds, and jointenants but one, yet it is to be underſtood, that tenants in common have ſeveral freeholds, but undivided; and jointenants have one undivided freehold. As to the caſes of wills urged by my Brothers, ſurely the conſtruction of wills is no rule for the conſtruction of a deed executed in one's life; for if land by deed be given "to *J. S.* for ever," it is but an eſtate for life; but in a will it would be an inheritance. And the caſe 27. *Hen.* 8. *pl.* 27. lands to one and his heirs male by will is an eſtate-tail, but in a deed it would be a fee: and the reaſon of this diverſity is, that the law, which allows him to deviſe, will conſider his circumſtances, and not hold him to the ſtrict rule of law: and this was the common law, where one might deviſe by will in boroughs and towns, and was practiſed before 32. *Hen.* 8. c. 1. *Vide* 12. *Hen.* 6. *f.* 12. A deviſe to an infant *in ventre ſa mere* is good, by the ſame reaſon, but a grant would be void (*b*); and ſo wills being now made generally allowed ſhall have the ſame favour (*c*); and the reaſon of a caſe is the ſtrength of it; and *Ratcliff's Caſe* (*d*) does not ſay that theſe words make a tenancy in common, but only that it is a manifeſtation of the party's intent that there ſhould be no ſurvivor: and he agreed the caſe of a deviſe by implication of 13. *Hen.* 7. 22. a deviſe to a man's heir after the death of *J. S.*; and *Hob.* 24. *A.* by will makes *B.* his heir, which nobody can do, yet it is a good deviſe. 1. *Cro.* 366. a diverſity between will and ſurrender. In 2. *Roll. Abr.* 90. a deviſe to two daughters, "equally to be divided, *habendum* to "them and the ſurvivor, and the heirs of the body of the ſurvivor," adjudged a jointenancy, becauſe of the ſubſequent words, which do not contradict the words "equally to be divided;" for if they had, they would be rejected; for if they had made an expreſs tenancy in common, the ſubſequent words would be void. *Style*, 211. and 434. ſame caſe. a deviſe "to two and their heirs reſpectively;" and it was long before theſe words would make a tenancy in common in a will. *Dy.* 25. 128. *Bendl.* 19. 3. *Cro.* 330. which ſurely are ſtrong arguments that the law was taken clear in thoſe days, that it would not be a tenancy in common in a deed when the doubt was ſo great in a will. In 3. *Cro.* 695. it is laid down as a ground, that it will not make a tenancy in common in a deed as it will in a will. And ſeeing theſe words will not make a tenancy in common, in rigour and ſtrictneſs, there ought to be no

* [303]

(*a*) Hob. 120. Moor, 868.

(*b*) See 10. & 11. *Will.* 3. c. 16. *Reeve v. Long*, 1. Salk. 227. Doe on Demiſe of Clerk, *v.* Clerk, 2. H. Bl. Rep. 399. Lancaſhire *v.* Lancaſhire, 5. Term Rep. 4.

(*c*) See Roe *v.* Quartley, 1. Term Rep. 634. and Bull. N. P. 105.

(*d*) 5 Co. 57. 2. Roll. Abr. 89.

ſtraining

make a jointenancy into a tenancy in common; for is favoured in law; for it hates fractions of eſtates; cation of tenure is upon this ground; for if the tenure e, and land come to two tenants in common, they old by a horſe, *Bruerton's Caſe (a)*; and ſo it would or every fifth copyholder would pay a fine, if this ncy in common; and this I take to be the reaſon that eſtates are hated in law. And as to the caſe in the nd year of *Charles the Second*, it was a rule *niſi* by two ıſt one, and at another day the rule was diſcharged, and nded by the death of one of the parties; and that is no ainſt me: and the conſtant opinion of lawyers, both from ıch, are with me; but my Brothers make the majority: : let the plaintiff have judgment (*b*).

FISHER *againſt* WIGGS.

gment is ſaid to have been rit of error, Stringer *v.* ı. Abr. 291.; but this iſt ke, for upon a ſearch of LEE, *Chief Juſtice*, it r that any writ of error Goodtitle *v.* Stokes, nd in the caſe of Rigden D HARDWICKE approves t upon the principles and doctrines laid down by TURTON and GOULD, *Juſtices*, 3. Atk. 371. 2. Vezey, 252. See alſo Denn *v.* Gaſkin, Cowp. 660. and that the words "equally "to be divided" make a tenancy in common in a will, ſee alſo Prince *v.* Heylin, 1. Atk. 493. Owen *v.* Owen, 1. Atk. 494. Heath *v.* Heath, 2. Atk. 122. Hawes *v.* Hawes, 3. Atk. 525. Stone *v.* Hemtly, 1. Vezey, 165. Stratton *v.* Beſt, 2. Brown's C. C. 233.

Parry *againſt* Villars.

Caſe 493.

IL had entered into a recognizance in the common whereby *recognoverunt et quilibet eorum recognovit* to :wo thouſand pounds to the plaintiff, upon condition ndant in an action there ſhould pay principal * debt, ; body, &c. A *ſcire facias* was brought after judg- the bail, to which the bail pleaded "no *capias* againſt pal;" to which there was a replication; and de- judgment for the plaintiff, *quòd recuperet ſeparales* ro thouſand pounds againſt them.

Writ of error out of the common pleas, the writ was right, but the judgment ill entered; the Court inclined it was a good ground for the commonpleas to amend, but cannot be done in the king's bench.

rit of error, this was aſſigned for error, *viz.* that the *facias* demanded judgment only of one two thouſand :h was all they were bound for, and the judgment was al ſums of two thouſand pounds, and ſo a variance; was quoted 1. *Sid.* 239.

COURT agreed that this was error; but doubted writ being right and judgment ill entered, this fault in e not amendable; BUT THEY AGREED that this could here, it being a record of the common pleas, which uſt take as they find it. And the way to have enter- ent here had been to enter it for two thouſand pounds *ſeparaliter*. *Palm.* 546. 2. *Hen.* 4. *pl.* 13. But , that the writ being well was a good ground for n the common pleas.

The

Case 494. The King *against* Kirk and Cage.

If a principal and his second in a duel go abroad on the death of the adversary, and on an indictment found, appear and give notice of trial to the prosecutor's clerk in court, the prosecutor ought to bring on the trial the same Term or session, unless there be some special cause to prevent it.
S. C. post. 309.
S. C. 5. Mod. 454.
S. C. Holt, 86.

POPHAM CONWAY, ALIAS *Seymour*, having a sudden falli out with *Kirk* in *St. James's Park*, after hot words and so blows there, *Seymour*, *Kirk*, and one *Cage*, *Kirk's* friend, imm diately walked out of the Park; and *Seymour*, in his way, took one *Morely* as his friend with him; and as soon as they got out the Park they all four fought, where *Seymour* received a wo from *Kirk*, which put him into a fever, whereof he died; whe upon *Kirk* and his friend *Cage* fled.

The coroner's inquest found this *murder*, and a bill was li wise found by the grand jury; and process thereupon; and *non inventus* returned. Afterwards in the Vacation, they, having surr dered themselves, gave the prosecutor's clerk in court notice they would move the first day of next Term to have a trial.

And upon that motion THE COURT *seriatim* delivered t opinions.

GOULD, *Justice*. Here is a murder found by the coroner's quest, and a trial ought not to be sparred on specially, where ther no affected delay in the prosecutor: and here they fled from just but afterwards surrendered, and lately gave notice; and their r render ought to be reckoned from the notice given, since * w there is not sufficient time for the prosecutor to prepare: the fore no trial.

* [305]

TURTON, *Justice*. Liberty is one of the darlings of the l wherefore there ought not to be an affected delay of prosecuti but here it is their own fault that they are not tried sooner, why did they fly? and I am not satisfied that notice to the cler court is good here; but there ought to be immediate notice to prosecutor, and no difficulty ought to be put upon a prosecutic

HOLT, *Chief Justice*. The trial ought to go on, not out favour, but of right; for by the law of the land malefactors ou to be brought to punishment in convenient time for public ample; and it is five months since the fact was committed, an was almost in the face of the Court; and surely five months is c venient time: Then as to their flight, that ought not to be n an ingredient, for they incurred the penalty of the law for already, *viz.* the forfeiture of goods and chattels in case of quittal (*a*). And as to the point of notice, the prosecutor ough have been in court at the return of *non est inventus*, to take a proceis, and so have notice of surrender; and the not d whereof argues his laches. *Vide* 3. *Hen.* 7. a statute for spe trying of murderers, which is not in favour of offenders, bu bring them to justice: And there has been neglect in the pr cutor, even since notice given, for that was on the tenth inst and this is now the twenty-fourth.

(*a*) See 4. Hawk. P. C. 7th edit. ch. 49. § 14.

hen IT WAS MOVED they ſhould be bailed.

Priſoner not bailable on trial being put off. Poſt 309.

it HOLT, *Chief Juſtice*, ſaid, that ſince the trial is put off for de- in them, there is no room for bail without ſome ſpecial cauſe.

nd be ordered it to be made a rule of Court, that the witneſſes ound over to appear againſt the priſoners next Term.

On trial put off witneſſes bound over.

OTE, In this caſe it was granted, that ſome of the grand jury found the bill might be of petit jury.

Perſons on the grand jury who found the indictment, may be of the petit jury.

nd HOLT, *Chief Juſtice*, ſaid, that the evidence ſworn before coroner could not be offered here, if they might have the wit- s themſelves.

Depoſitions before the coroner cannot be read if the deponents live.—Keby. 55. Keyl. 180. Salk. 281. 2. Jones, 53. 1. Hale, 305. 2. Hale, 284. , 337. 2. Stra. 920. Bull. N. P. 239. 4. Hawk. P. C. 7th edit. ch. 46. ſ. 15.

ind by HOLT, *Chief Juſtice*, Though their going out of the k was by mutual conſent, and though they had done it for more veniency, yet it being upon a ſudden falling out, and in pur- ce of that heat, it cannot be murder.

Homicide on a ſudden falling out cannot be murder 2. Jo. 53. Keyl. 55. 1. Sid. 277. Keyl. 56. Cromp Juſt 25. 3. Inſt. 51. Keyl. 26.

lor is it material who drew firſt, ſince both had weapons drawn; if *Kirk* be guilty, *Cage* muſt be ſo too; and it may be a ſtion whether *Morley*, though the deceaſed's ſecond, be not ſo wiſe: and though the wound were not the immediate cauſe of *our's* death, it ſuffices that it be the mediate cauſe.

* [306]

* Richardſon *againſt* Seiſe. Caſe 495.

FEME COVERT by the conſent of her huſband made her will, and appointed another *feme covert* her executrix. Her father, oath of her dying a widow, obtained adminiſtration; and g cited below by the executrix to have the adminiſtration re- d, moved for a prohibition, upon a ſuggeſtion that ſhe was *t* at the time of her death, and had a rule *niſi*.

A *feme covert* may make a will with conſent of her huſband.

he matter being opened to the Court, they diſcharged the

OLT, *Chief Juſtice*. A married woman cannot make a will, as executrix, without conſent of her huſband (*a*). *Roll.* "*Executor*" 912. If a *feme covert* be executrix and legatee, niſtration *de bonis non* ought to be to her huſband; if ſhe be egatee, and others are, it ought to be given to them; if there o legacies, to the next of kin to the firſt teſtator.

OTE, A papiſt convict cannot be an executor; *ſecus* he may; 1. Jo. 249 201. 1. Vent. 217.
OLT, *Chief Juſtice*.

(*a*) See Dubois v. Trant, poſt. 436.

Child

Case 496.

Child *againſt* Harvey.

Trial ſet aſide.

THE *niſi prius* was, "*die Lunæ in menſe Paſch.*" and no could be that year, wherefore the trial was ſet aſid 2. *Rich.* 3. *Cro. Eliz. Webly v. Moxely*, 9. *Edw.* 4.

Case 497.

Turner *againſt* Main.

Not ſaying where the converſion was is cured by verdict.

S. C. 5. Mod. 444.

ACTION UPON THE CASE by the aſſignee of comm of bankrupt, ſetting forth, that the bankrupt had r ſuch a ſum againſt the defendant's teſtator, and that execu mained to be done, and debt was aſſigned to the plaint that goods to ſuch a value of the teſtator came to the def hands, which he converted to his own uſe. After verdic moved in arreſt of judgment,

FIRST, That it was not laid where the goods came to h or where the converſion was.

Sed non allocatur; becauſe though the execution would h good on demurrer, yet now it was not material after verd

Chancery may refuſe to grant a commiſſion without petition; but if it do, it is good.

SECOND EXCEPTION, Becauſe it is not ſaid that this com was obtained upon petition in writing, as the ſtatute direct

Sed non allocatur; for though chancery may refuſe to commiſſion without a petition in writing, yet if they will ſhall not * vitiate; and this may be a ſupplemental com which requires no petition in writing.

* [307]

Declaration by aſſignee without ſaying the money had been paid to the bankrupt, is good

THIRD EXCEPTION, That it was not ſaid in the decl that the money was not paid to the bankrupt before the bankruptcy committed.

But PER CURIAM, Saying that execution remained to b ſupplies that.

And the plaintiff had judgment.

Case 498.

Lenox *againſt* Boddington.

Imparlance, not neceſſary to have entry of *defendit vim.*

ONE pleaded a foreign plea after imparlance, which not be.

But it was objected, not to be after imparlance, becau was no entry of *defendit vim et injuriam.*

But PER CURIAM, That is not neceſſary to an imparla

Marley *againſt* Blunt. Caſe 499.

was pleaded to an action in this court, that there was another action for the ſame cauſe depending in the common pleas; *nul record* pleaded; rejoinder, that the defendant had diſcontinued action in the common pleas; and to that demurrer, and *reſp.* r.

Action diſcontinued, is not action pending.

Bromefield *againſt* Snoke. Caſe 500.

R CURIAM. "Thou haſt no more but what thou haſt got by cozening and cheating;" not averring that he was of trade, or that he had anything; is not actionable (*a*).

Words.

(*a*) Same point, Savage v. Robery, Salk. 694. Tamlin v. Hamlin, Raym. 181. Ludwell v. Hole, 2 Str. 1. Davis v. Miller and his Wife, Stra. 1169. Shipman v. Shellitto, Str. Rep. 1688. Todd v. Haſtings, Raym. 307. So alſo to ſay "You are a ſwindler," are words not in themſelves actionable, becauſe the word *ſwindler* means no more than *cheat*, Saville v. Jardine, 2. H. Bl. Rep. 531. But ſuch expreſſion, if written and publiſhed, is libellous, Parſon v. Stuart, 1. Term Rep. 748.

Pierceſon *againſt* Hulls. Caſe 501.

ROR aſſigned of a judgment from the court of common pleas, that there was a miſcontinuance, the continuance being from day to another in the ſame Term; which, as was urged, could be, Term being but one day in law.

A continuance may be from one day to another in the ſame Term.

at it was over-ruled,

S. C. 2. Lutw. 638.

S. C. New Lutw. 524.

NOTHER ERROR was, that the time of imparlance was to *l. Paſch.* inſtead of "*a die Paſch. in quindecim dies.*"

Imparlance how to be entered.

ud *etiam fuit rejectum* PER CUR.

* [308]

* Moiſy *againſt* ———. Caſe 502.

EBITATUS for goods had from the plaintiff, without ying "ſold," and that moved for exception, but over-ruled; for OLT, *Chief Juſtice*, It would lie for rent or bond.

Indebitatus for goods, not ſaying ſold.

The King *againſt* The Borough of Abingdon. Caſe 503.

was a return to a *mandamus*, the filing whereof was oppoſed on affidavits of ſeveral burgeſſes, that it was made by THE OR in the name of the major part of the corporation, without nt of them.

A return to a *mandamus* directed to a corporation, made by the mayor in

me of the major part of its members, without their conſent, is *a falſe return*, for which an *in-* lies againſt the mayor.—S. C. poſt. 401. S. C. 1. Salk. 431. S. C. 2. Salk. 699. S. C. 499. S. C. Holt, 440. S. C. 1. Ld. Ray. 559. Ante, 126. 6. Mod. 133. Caſes T. H. Stra. 55.

THE KING *againſt* THE BOROUGH OF ABINGDON.

IT WAS AGREED, that the return ought to have been by conſent of the majority of the corporation, for they ought to anſwer the writ to whom it was directed; and it being directed to the whole corporation, it ought to be anſwered by the whole corporation, that is by the majority of them.

And HOLT, *Chief Juſtice*, ſaid, If a writ come to the ſheriff and another make a return to it in his name, the ſheriff may come and diſavow it the ſame Term, but not in a ſubſequent one. *Dyer*, 182. So here will be two queſtions in this caſe: FIRST, Whether we ought to admit them to diſavow this return? SECONDLY, In caſe we do it, Whether they ought not to do it in proper perſons? For to examine here, upon affidavit, how that fact ſtands, is without example; but we will handle that perſon roughly that ſhall make a return in the name of the majority without conſent; for as they cannot make a return, though they are the majority, without the mayor; ſo the mayor cannot make a return without the majority of them; and the return muſt come by the mayor's hands into court.

By the common Law, if a charter fix a particular day for the election of a mayor, the election muſt be on that day.

NOTE, By their charter they are impowered to proceed to an election on ſuch a day.

And by HOLT, *Chief Juſtice*, and TURTON, *Juſtice*, If they do not chooſe on that day, they cannot do it the next day, for they muſt purſue their patent, and that gives power only for one day; and though the mayor be ſick, ſo as he cannot officiate that day, there is no remedy.

And TURTON, *Juſtice*, ſaid, that in ſuch a caſe they were forced to petition, in the *Caſe of the Corporation of Norwich*; and they ſaid, they had known a *quo warranto* gone againſt a corporation for chooſing at another day.

But WRIGHT, then king's ſerjeant, and ſince lord keeper, was ſtrong againſt this opinion (*a*).

* [309] And at laſt an * information was filed againſt the mayor for making a falſe and undue return; and the principal point was not determined.

(*a*) See now by ſtatute 11. *Geo.* 1. c. 4.

Caſe 504.

The King *againſt* Kirk.

The Court may bail in murder, but very ſeldom do.

KIRK was brought up by rule in hopes of being bailed, his trial having been put off as before (*a*); and *Latch*, 12. 1. *Bulſt. Egerton* and *Farrington* was quoted.

S. C. ante, 304. S. C. 5. Mod. 454. S. C. Holt, 86. 1. Salk. 103. Andr. 65.

(*a*) See S. C. ante, 304.

E COURT remembered *Coke's* ſaying in *Bulſtrode*, that ower to bail one in caſe of *murder*, but he would not thout ſpecial command from the king; and that HALE it rarely or never ought to be done.

THE KING *againſt* KIRK.

was remanded, there being two indictments of murder n.

The King *againſt* Fuller. Caſe 505.

conviction upon the ſtatute of 8. & 9. *Will.* 3. c. 19. mplaint was laid to be made on the thirty-firſt of *March*, ction was on the third of *April*, and was, that he *modo huc tenet*; and for this it was quaſhed, for that a fact r could not be on another day.

The evidence in a conviction muſt appear to be of fact prior to the information.

2. Barnes K. B. 287. 396. S. C. 1. Seſſ. Caſes, 285. S. C. 1. Ld. Ray. 509.

Burch *againſt* Scory *(a)*. Caſe 506.

ER FOR GOODS; to which it was pleaded by the de- it, that he had bought them in *market overt*.

Sale in *market overt* muſt be at a convenient time.

Chief Juſtice. You muſt prove the ſale in market at a convenient time.

be bought upon liking, the vendee muſt return them, his detaining, or not ſending them back, is ſufficient f a liking. So if he declare his diſlike, but afterwards them. So if goods be ſold on liking, and before the day he party by the agreement is to return them, he ſells or all or part of them, it is a liking; and time of liking or goods is eight days by act of ———.

Goods bought on *liking* muſt be returned in a convenient time.

(*a*) This was at *niſi prius* before HOLT, *Chief Juſtice*.

* [310]

Hart *againſt* King. Caſe 507.

OF EXCHANGE was proteſted and loſt, and an action ht againſt the drawer; and it was proved that the de- d owned he had drawn the bill; and held good * by *ief Juſtice*.

In an action againſt the drawer of a loſt bill, his acknowledgment of having

fficient.—S. C. Holt, 118. 1. Show. 164. Kyd on Bills, 139, 140. 270. Gilbert's 119.

Chief Juſtice, ſaid, that this being an outlandiſh bill, the s made liable by *the proteſt*; but no proteſt is neceſſary in inland bill (*a*).

Drawer made liable by *proteſt* of a foreign bill.

hat to make a bill payable to one's order was the ſame e to him or order (*b*).

A bill "*to my* "*order*," and "*to A. or order*," the ſame.—1. Salk. 133.

t 10. *Will.* 3. c. 17. ſ. 2.; m. c. 9. ſ. 5.; Borough v. d. 81.; and 1. Term Rep. 1 Bills, 136.

(*b*) Fiſher v. Pomfret, Carth. 402.

AND

Notice of proteſt muſt be proved in an action againſt the drawer of a bill.

AND HE SAID, that if the defendant could make it appear, that he was at any damage for want of notice of the proteſt, as if the drawee had failed in the mean time, &c. it would be incumbent upon the plaintiff to prove notice given of the proteſt in convenient time (*a*).

(*a*) See the ſtatutes 9. & 10. *Will.* 3. c. 17. ſ. 2.; the 3. & 4. *Ann.* c. 9. ſ. 5. and the caſe of Harris v. Benſon, Sta. 910. Gooſtree v. Meade, Bull. N. P. 270.

Caſe 508.

Bignoll *againſt* Rogers.

In debt on a certificate on 6. & 7. *Will & Mary*, c. 17. the hand-writing of the Judge who granted it muſt be proved.

IN DEBT againſt the ſheriff of *Bucks*, for the reward given by the ſtatute 6. & 7. *Will. & Mary*, c. 17. to thoſe that ſhould diſcover and convict clippers and coiners.

NOTE, Here the plaintiff had a certificate from my *Lord Chief Juſtice* HOLT, who tried the malefactor, of his having been convicted on the plaintiff's evidence; which being produced, though under my lord's hand, yet it was proved by my lord's clerk to the jury.

On a certificate of conviction, a *mandamus* of payment attaches it as a debt on the ſheriff.

5. C. Holt, 644.

And here HOLT, *Chief Juſtice*, held the demand of this debt on the ſheriff, after the certificate, did attach the debt upon him; and that the money was to be paid out of the profits of the county, or, upon failure thereof, out of the exchequer; and that in ſuch caſe the action would lie againſt the ſheriff's executor, becauſe given by act of parliament, and attached in the teſtator; but for the penalty given by the act againſt the ſheriff for default of payment, that ſhould not affect the executor; and that if the ſheriff paid the debt and died, it ſhould be allowed to his executor.

Caſe 509.

Holland's Caſe.

Interrogatories againſt an attorney.

HOLLAND, an attorney of the court, informed his client that he had entered up judgment two years before, but could not ſue execution, by reaſon of the writ of error pending, when in truth there was no judgment entered; and for this notorious practice was ordered to anſwer interrogatories.

Recognizance diſcharged if interrogatories are not filed in a week. See 3. Hawk. P. C. 7th edit. ch. 22. page 273. *notis.*

AND HERE IT WAS AGREED, that if interrogatories be not exhibited in a week, the recognizance entered into for anſwering them is diſcharged of courſe.

Party has *four days* to anſwer interrogatories. 3 Hawk. P. C. 7th edit. 273. Saunders v. Melluiſh, 6. Mod. 73.

IT WAS LIKEWISE AGREED by the Court, and SIR SAMUEL ASHTRPE, *Maſter of the Crown Office*, that in all caſes the party has four juridical days to anſwer the interrogatories, though they be exhibited in Vacation; but if he do not anſwer in that time he is to be committed upon motion.

* [311]

Caſe 510.

* Anonymous.

Excommunication.

PER HOLT, *Chief Juſtice*, If a man be excommunicated, a prohibition ſhall aſſoile him.

Anonymous.

Anonymous. Caſe 511.

TROVER the caſe was this: The king's orders were iſſued on the diſbanding of the army, that each trooper ſhould retain orſe; and this action was againſt a captain, who in breach e ſaid order had taken the trooper's horſe.

ND IT WAS HELD that trover lay for the trooper in this caſe; lthough, before, the property was in the king, yet by the order vеſted in the trooper, he having the poſſeſſion at that time.

A *trooper* may, on the king's order to retain his horſe, maintain TROVER againſt his captain for detaining it.

The King *againſt* Laurence. Caſe 512.

N INFORMATION was filed againſt him for writing a letter to *Sir John Pigot*, deſiring him to moderate his zeal, for that king, meaning *King James the Second*, would be ſoon re- d; and that for further ſatisfaction herein, he would ſoon hear many lords would repair to him to *France*; what to do he t gueſs. And being found guilty he was fined twenty marks, committed till payment.

Information for writing a letter.

Steward *againſt* Floyd. Caſe 513.

ON a writ to the ſheriff he firſt made a warrant to the bailiff of a liberty, and afterwards to his own bailiff, who arreſted arty and ſuffered him to eſcape, and then the ſheriff returned *avi bativo*.

pon an affidavit of the fact the ſheriff was ordered to attend:

id it was agreed, that an action lay againſt the ſheriff for the return, as *non eſt inventus*, *&c.* and his amercements were ated.

Action againſt ſheriff for falſe return.

The King *againſt* Slaughter. Caſe 514.

AUGHTER was indicted upon 5. *Eliz.* c. 4. for uſing the rade of a *felt-monger*, not having ſerved ſeven years to it.

WAS MOVED to be quaſhed, for that it was not a trade wn at the time of making the ſtatute. *Vide* 2. *Cro.* 499. a *hemp-dreſſer* is not a trade within the ſtatute.

at * after a rule *niſi* had been obtained,

OLT, *Chief Juſtice*, ſaid, that it was fit for a jury to try ther it were a trade then or not (*a*); and why not as well as preſcription; and therefore was againſt quaſhing it upon that ption. And he affirmed that the trade of *a wool-comber* was in the ſtatute (*b*), though the contrary had been adjudged in ourth year of *James the Second*.

A *felt-monger* is a trade within the 5. *Eliz.* c. 4. S. C. 2. Salk. 611. S. C. 1. Ld. Ray. 513. S. C. Holt, 68. 2. Ld. Ray. 1179.

* [312]

6. Com. Dig. "Trade" (D. 5.).

(*a*) See Rex *v.* Thomas, 4. Mod. 145. (*b*) Player *v.* Petit, 1. Sid. 269. 1. Lilter, 1. Stra. 788.

Case 515.

Trevanion *against* Tooker.

Judgment amended.

1. Roll. Abr. 201. 1. Vent. 217. Cro. Car. 594.

A PLAIN miſtake of the clerk in the entering up of judgment amended in the next Term, by conſent of the party for advantage the miſtake was: *Ex motione* CARTHEW.

Cro. Jac. 628. 1. Ld. Ray. 897. Stra. 313. 1. Com. Dig. "Amendment"

Case 516.

The King *against* Tooley.

Motion for attachment for not obeying a peremptory *mandamus*.

Ante, p. 257.

TOOLEY had been a mayor of a corporation, and de ſwearing in the mayor elect; and after a peremptory *damus* an attachment was moved for againſt him, upon af that he kept out of the way, ſo that there could not be a pe ſervice made to him; and that the writ had been left at his h and ordered he ſhould ſhew cauſe, &c. And a difference taken between this and the caſe where money is to be p an award; for there there ought to be perſonal notice before ment:—*Sed quære*, if it be not *par ratio*.

Case 517.

Dillon *againſt* Walcott.

...n reverſal of ...tainder of h...gh ...ſon, the *terre-* ...ſhould be ...with *jeo-*

...nt. 407. 6.

...6. 4, 5.

THE DEFENDANT's attainder of high treaſon being re for want of the words "*ipſo vivente*" in that part of t tence which concerns the burning of his bowels; and the ment of reverſal being affirmed in parliament; reſtitut awarded by the king's bench in *Ireland*, without any *ſcire* againſt the *terretenants* of the patentees of *Walcott's* eſtate writ of error brought into the king's bench hither, and this allowed to be a good error (*a*).

But NORTHEY, ſince attorney-general, excepted agai writ, becauſe it did not appear by it, who were parties award of reſtitution; for if the award of reſtitution be r there muſt go a *ſcire facias* againſt the preſent *terretenants*, cannot be if it do not appear by the writ who they are.

(*a*) But it is now ſettled, upon examination of all the precedents, that ſuch *ſcire facias* is not neceſſary in the caſe of high treaſon. Rex v. Stafford, Mich. Term. 12. *Ann.* 4 Hawk. P. C ch. 50 ſ. 14. *note*. See alſo Bel Caſe, Dyer, 34.

Case 518.

* Anonymous.

Ante, p. 225.

CONCERNING awarding execution in *Ireland* upon verſal or affirmance of a judgment in *England*, were *Jel.* 118. 3. *Keb.* 44. *Theſaurus Brev.* 165; and that c cannot impower the courts of *Ireland* by *mittimus*, we *Kel.* 29. *Vaugh.* 393.

...aſe 519.

Anonymous.

...ſon in ex- ...n how to ...ed. Prac. Prac. 5 to 57.

A. is in execution at the ſuit of *B.* and charged with a at the ſuit of *C.* who obtains judgment; he ought t in execution by *committitur*, and not by *capias ſatisfacien* he may have a *fieri facias*. But *quære*, if after he has char

committitur, he may have *fieri facias*, he continuing ſo in ex- ANONYMOUS.
ution. By the ſtatute, if one in execution by *capias ſatisfacien-* eſcape, the plaintiff may ſue a *fieri facias*.

Anonymous. Caſe 520.

N ACTION FOR WORDS was laid in *London*; and an affidavit for changing *the venue* was, that if any ſuch words were ken by him, they were ſpoke in the county of *Lancaſter*, *&c.* And becauſe the Court could not order a trial there, it being *unty palatine*, they changed *the venue* into the next county, into *York*; though the proof lay all upon the plaintiff, who all his witneſſes in *London*, and that the defendant could not ve a negative, *viz.* that he had not ſpoke the words, otherwiſe n indirectly, by producing thoſe that were in the room at the e; and that they did not hear any ſuch words, or that no ſuch ourſe was, &c.

Venue changed to the next county to county palatine.

Stra. 1216. 1258. 1270. 1. Wilſ. 138. 221. 4. Burr. 2450. 2. Black. 962. Dougl. 262.

Anonymous. Caſe 521.

DECLARATION in ejectment had been delivered to one to whom the keys were given to let the houſe.

ER CURIAM, Not good, becauſe it ſhould be to the tenant in eſſion; and he is only a ſervant, and the plaintiff is not with- remedy, for he may ſign a leaſe on the land (*a*).

Ejectment ſerved on the perſon who had the keys.

Barnes, 178. 188. 192. Stra. 575.

(*a*) See Mr. Serjeant Runnington's Legal Remedy by Ejectment, 155, 156.

Dair *againſt* The Earl of Stamford. Caſe 522.

R BARTHOLOMEW SHOWER moved for a prohibition to the court of chancery, upon a writ of ſequeſtration out of t court, whereby lands were ſequeſtered; and ſuggeſted that chancery was only a court of equity, having only juriſdiction r perſons in caſe of diſobedience to their decrees, and not other- e; and he affirmed, that though it were called the high court chancery, yet if it ſhould go againſt law, or exceed its juriſ- tion, it would be under the controul of the court of king's bench, they upon *habeas corpus* will deliver one * illegally committed them. And he ſaid, that at firſt theſe ſort of ſequeſtrations re only granted in caſe of perſonal duty concerning land; but y ought not to ſequeſter lands for a debt ariſing upon a perſonal ntract not concerning the land ſequeſtered.

Motion for prohibition to the chancery.

* [314]

OLT, *Chief Juſtice*. You move for a ſtranger to the bill and wer, and proceedings in chancery; and therefore you muſt take r remedy at law. You do not tell that you have brought treſ- againſt this ſequeſtrator, and that they ſtop you by injunction of chancery.

DATE *againſt* THE EARL OF STAMFORD.

And no more was done in this matter.

NOTE, I have heard THE MASTER OF THE ROLLS ſay, th that way of ſequeſtration ſeemed now to have the countenance an act of parliament, for that the ſtatute of . *Will.* 3. did reci it, and allowed it. *Vide* ſtatute.

Caſe 523.

The King *againſt* Taylor.

Information for offering to buy votes for parliament election.

LEAVE was granted to file an information againſt one Tay *lor*, for offering to buy votes, in order to election of pa liament (*a*).

(*a*) See 7. & 8. *Will.* 3. c. 7. ; the 2. *Geo.* 2. c. 24. and 2. Hawk. P. C. 7th edit. ch. 67. ſ. 10. *notis*, where the caſes upon the ſubject are collected.

Caſe 524.

The King *againſt* Chaloner.

If a perſon be convicted on a penal ſtatute which directs the penalty to be levied by diſtreſs, or for de ... the offender to be com... and the juſtice directs his warrant of diſtreſs, "To all "Conſtables, "&c." to which a conſtable of a pariſh in which the offender did not inhabit, returns that he had nothing within that pariſh, the juſtice cannot thereupon commit him; for *non conſtat* but he may have goods elſewhere.

CHALONER was convicted upon the ſtatute of 3. & 4. *Will. & Mary*, c. 10. of deer-ſtealing, upon an information exhibited againſt him before a juſtice of the peace for killing ſeveral fallow deer, &c. *contra formam ſtat.* by which he had forfeited thirty pounds for each offence.

Upon non-payment a warrant was iſſued againſt him, directed "TO ALL CONSTABLES of the County," to have the money levied by diſtreſs. The conſtable of *Dale*, which appeared to be another pariſh than that where *Chaloner* was an inhabitant, returned that he had nothing in *Dale*, or any where elſe in the county. Whereupon the juſtice committed him to priſon for a year, and to ſtand on the pillory. All this appearing on *habeas corpus*,

EYRES moved to have him diſcharged; for the foundation of the commitment is his having not wherewithal to ſatisfy the ſeveral thirty pounds in the ſame county; and that is to be made apparent by a warrant to levy the ſame, which if illegally awarded or executed, the commitment is illegal; and all that ſhews want of diſtreſs here, is the return of the * conſtable of *Dale*, that he had no diſtreſs in his pariſh, or in the county; a matter not lying in his knowledge farther than within his own pariſh.

ANOTHER EXCEPTION was, That the conviction was on the eighth; at which time he might have ſufficient whereupon to levy the penalty, and the warrant not made till ſeveral days after; and by the ſtatute he is not committable, but for want of diſtreſs immediately after the conviction; and therefore the warrant ought to be made immediately upon conviction. *Ideo* this warrant is illegal.

And it was agreed PER TOTAM CURIAM, that he was not to be impriſoned, but upon failure of payment and diſtreſs.

SIR BARTHOLOMEW SHOWER and NORTHEY *contra*. There is no way for juſtices to know the want of diſtreſs but this; they cannot

S. C. 1. Sid. 156. S. C. 1. Lev. 113. S. C. Hok, 214. S. C. Salk. 378. S. C. 1. Ld. Ray. 545. S. C. 5. Mod. 446. S. C. Carth. 501. 508.

cannot direct their warrant to the ſheriff, who is the univerſal officer of the county, becauſe he is no officer to execute a warrant; but their proper officer is a conſtable; and the warrant being directed "To all conſtables," and delivered to one, it is the ſame thing as if it were delivered to every one of them in particular; and the juſtice cannot enquire by jury as a ſheriff may, whether the offender has diſtreſs or not; ſo there is no other way but this which has been taken. A conſtable indeed is not compellable to execute a warrant out of his vill, but may lawfully do it if he pleaſe, and ſhall upon "not guilty" in falſe imprisonment give ſuch a warrant in evidence: and if an inhabitant of *Clerkenwell* commit a felony in *Iſlington*, it is a good exception to an indictment againſt him, "that he of *Iſlington*, &c. in the county of *Middleſex*, did, &c." the caſe of *Egerton v. Morgan*. Or if that be againſt us, it will be well enough this way: All the ſtatute requires is, that juſtice of peace may make his warrant to levy, &c. by diſtreſs; and ſo any man, to whom ſuch a warrant is directed, may execute it, and is a good officer to that purpoſe; and ſo this warrant ſhall be taken to be made to this conſtable, not *quatenus* conſtable, but *quatenus* a ſpecial officer for that purpoſe; and if he make a falſe return, they have their remedy againſt him by action. And can it be imagined they ſhould ſtay for a return from every conſtable in the county, for the ſtatute impowers to detain the offender for two days, that in the mean time they ſhould know whether he has diſtreſs; which ſhews it muſt not appear by warrant, and return thereof from every conſtable in the county, for that is not practicable in ſo ſhort a time; and this being a penalty, it lies upon the offender to exempt himſelf thereof, by ſhewing where he has a diſtreſs.

* HOLT, *Chief Juſtice*. Your commitment is not purſuant to the ſtatute; for that is indeed that there ſhould be a warrant made by the juſtice to levy the money by diſtreſs, and a return thereof made; but not, that if it ſhould be returned that he has no diſtreſs, that thereupon he ſhould commit him; and here the commitment is a judgment; and therefore you ought to be ſatisfied that he has no diſtreſs, and make a record thereof, and ſay, "foraſmuch as it does appear unto me, that he has no diſtreſs, I do hereby, &c." (*a*). For, what authority has the conſtable of *Dale* to return that he has no diſtreſs in the county at large? No doubt a warrant "To all conſtables" is a warrant to every particular conſtable, and every one of them is bound to execute it in his particular juriſdiction. And when a warrant is directed to a conſtable by name of a conſtable, it muſt be intended to be directed to him as conſtable. * [316]

GOULD, *Juſtice*, ſeemed to incline, that if this had been a warrant directed to the conſtable of the vill where the offender

(*a*) See Dr. Bonham's Caſe, 8. Co. 114. S. C. 2. Brownl. 255. S. C. Hughes 226.

THE KING *againſt* CHALONER.

lived, and he had returned that he had nothing in the vill, it w have been well.

But the priſoner, upon this exception, was diſcharged.

Caſe 525.

Anonymous.

Colour remedied by replication.

HOLT, *Chief Juſtice.* If, in bar, the defendant fail of gi *colour* where it is neceſſary to give colour, that omiſſi remediable by the plaintiff's replication; for he ought to tak vantage of lack of colour before he replies.

Caſe 526.

Stringer *againſt* Aliſon.

Where courts held, ſhould be ſet forth.
S. C. Ld. Ray. 532.
Poſt. 318.

PER CURIAM. Where anything is ſet forth to be in the c of king's bench or chancery, it ought likewiſe to be ſet f where thoſe courts were kept; and 27. *Hen.* 6. *pl.* 10. a writ abated for want of it (*a*).

(*a*) This was a *ſcire facias* againſt bail: Exception was taken that it was not ſtated where the Court was held where the judgment was given, and Cro. Eliz. 504. Yelv. 227. were cited: But HOLT, *Chief Juſtice*, ſaid, the exception very ſlight, and that it ſhould have ſhewn as cauſe of demurrer: and t fore judgment was given for the pl

Caſe 527.

Newton *againſt* Rowland.

An attorney executor ſhall not have privilege.
S. C. 1. Salk. 2.
S. C. 1. Ld. Ray. 533.
Salk. 7.
Hob. 177.
2. Sid. 157.
Noy, 68.
Poph. 329.
Sellon's Pract. 2. vol. 79.

DEBT againſt an attorney *as executor*, who pleaded his p lege, &c. and upon demurrer,

IT WAS URGED *for the defendant*, that the reaſon of privi in that caſe was in reſpect of his perſonal attendance, which equal whether ſued in his own or *in auter droit*.

But by HOLT, *Chief Juſtice*, The authorities are on the c ſide in this caſe.

And the plaintiff had judgment *niſi*.

* [317]

Caſe 528.

* The Earl of Kent *againſt* Walters.

Writ of enquiry ſet aſide in trover, becauſe evidence of value was refuſed.

IN TROVER for ſeveral loads of wood, and judgment by de and writ of enquiry executed,

IT WAS MOVED to ſet aſide the writ of enquiry, upon affi that the ſheriff refuſed to receive any evidence of *the value* c wood, but directed the jury to find the full damages dec of.

And for that it was ſet aſide, upon payment of coſts.

iis caſe NORTHEY ſaid, that a lord of a manor might
copyhold, by general cuſtom of copyhold, or elſe, if
yhold in fee, that wood would never be cut; which
iconvenient.

The lord of a manor cannot cut trees on the eſtate of a copyholder.
See Aſhmead v. Ranger, poſt. 378.

:T, *Chief Juſtice*, Surely he cannot, for the copyholder
e intereſt in the trees that he has in the land; and I
: taken it ſo.

The King *againſt* Patting. Caſe 529.

!G, being convicted of a riot, moved before judgment
ie *poſtea* returned, to ſubmit to a fine; and having
fidavits that the riot was in reſiſting one, who, by
proceſs of the admiralty, would ſeize on goods he had
or rent, he was diſcharged.

On conviction of riot ſubmitted to a fine diſcharged.
Ante, 235.

CURIAM, The *poſtea* ought to be returned the next
the trial.

Anonymous. Caſe 530.

Chief Juſtice. Upon a writ of error from the common
i: the record certified be faulty, of common right a
ay go to certify the right record.

Certiorari lies in error to bring in the right record.

Chanler *againſt* Driver. Caſe 531.

ISSION to an award being by rule of Court, MOUN-
E moved for an attachment for non-performance.

There ought to be affidavit of award demanded, &c.
er grant an attachment for non-payment of money
ard the firſt day, though the defendant be to do the

Payment on an award muſt be demanded before an attachment can iſſue.

: courſe of proceeding to
chment for non-perform-
ed, ſee 1. Comp. Pract.

269. 2. Bl. Rep. 990. and Kyd's Treat. on the Law of Awards, 216.

* Worley *againſt* ———. Caſe 532.

ound by verdict, that a warrant of attorney was
and judgment entered according to it was ſet aſide
n.

Judgment on a forged warrant ſet aſide.

Caſe 533.

Anonymous.

Fine muſt be abſolute.

Vide Keyl. f. 34.

HOLT, *Chief Juſtice.* A fine ought to be abſolute, and not conditional; and therefore a fine, unleſs ſuch a thing be done *in futuro*, is void. And by the common law, a fine for non-repairing of a highway was for the default in not repairing the highway, and ought to be abſolute; but by a late ſtatute the fine is to go towards the repair.

Caſe 534.

Anonymous.

If a record be pleaded, it muſt be ſhewn where it is.

Ante, 316.

PER CURIAM. When a man pleads a record, he ought to ſhew where it is, that the Court may have it; as if a record of the court of king's bench be pleaded, to ſhew it is *apud Weſtmonaſterium* in the county of *Middleſex*.

Caſe 535.

Corps *againſt* Kitchen Hall.

Bail additional of what Term to be.

Sellon's Pract. 165.

BAIL was put in in *Michaelmas Term*, and excepted againſt, and additional bail put in in *Hilary Term*.

The doubt was, whether the additional bail were of *Michaelmas Term*; and ſome ſaid the bail muſt refer to the return of the writ; and others would have it refer to the recognizance entered into. The miſchief would be in this caſe, to make the bail refer to *Michaelmas Term*, that if bail had aliened *bona fide* in the *interim*, to have the land charged with the recognizance by that relation.

HOLT, *Chief Juſtice.* It has been an old queſtion, Whether bail in this court be liable from the time of the recognizance, or from the time of the judgment.

And THE COURT here ordered proceedings to ſtay till they had conſidered of it.

Caſe 536.

Sherwin *againſt* Sir Walter Clarges.

Trial at bar in ejectment.

4. Mod. 379.
2. Lev. 66.
6. Mod. 309.
1. Keb. 827.
2. Black. Rep. 1158. Run. on Eject. 419.

WHEN it appears to the Court that a ſuit is vexatious, they will not grant A TRIAL AT BAR in ejectment, without naming a ſufficient plaintiff.

And by favour of the Court one may have a trial at bar, though he ſue *in formâ pauperis*.

* [319]

Caſe 537.

* Anonymous.

Vagrant may be ſent to his laſt ſettlement.

HOLT, *Chief Juſtice.* If a vagrant be ſent to the place of his birth, they may ſend him to the place of his laſt legal ſettlement (*a*).

(*a*) For the removal of vagrants ſee the ſtatutes 17. *Geo.* 2. c. 5.; the 32. *Geo.* 3. c. 45. 2. Hawkins's P. C. 7th edit. ch. 94. and Mr. Coſtt's edit. of Bott's P. L. 1. vol. 334. 414. 635. 637. 2. vol. 782.

Richardſon

Richardſon *againſt* Williams. Caſe 538.

A VERDICT in *a civil cauſe* may be given in evidence in *a criminal cauſe*; but not *vice verſa*; and THE COURT ſaid, they would hardly grant a new trial, where a verdict might become evidence in a criminal cauſe.

Verdict may be given in evidence.

Shoot *againſt* Higgs. Caſe 539.

BAIL upon writ of error cannot diſcharge himſelf upon ſurrendering his principal.

Bail in error.
1. Stra. 419.
1. Burr. 340.

The King *againſt* Warburton. Caſe 540.

IF RULE be for filing an information, and non-proceſs thereupon for non-appearance of the defendant, a new one cannot be without a new rule; for the firſt was executed.

Information.
Poſt. 325.

And here THE COURT gave a new rule, upon payment of coſts.

Orby *againſt* Pullen. Caſe 541.

AN AVOWRY was, that *J. S.* being ſeiſed in fee of ſuch and ſuch parcels of land, did by his deed, &c. grant a rent-charge &c. out of them *per nomina, &c. inter alia, &c.*

Avowry for a rent charge, whether all the lands charged ſhould not be named.

The exception taken was, That the avowant ought to name all the lands charged, and not by way of *inter alia*; for the defendant might then plead entry and ſuſpenſion, extinguiſhment, &c. in reſpect of the parcels omitted; and it would be ſo in an aſſize, for there all the land muſt be put in view, and the tenants all named.

Vide 7. Co. 3. a.

It was offered *contra*, that indeed where the grant is out of ſeveral particular parcels in certain, there thoſe parcels ought to be certainly named in the avowry; but where the grant is general, there it will be enough to name one place certainly, with an "*inter alia.*" *Vide Co. Ent.* 590. 6. *Co.* 39. * *Finch's Caſe.* 5. *Co.* 69. 1. *Co.* 54. 143. *Hearn's Pleader*, 761. 1. *Saund.* 189. 2. *Saund.* 195. *Thomſ. Ent.* 273. 276. *Winch*, 951. 979. 1013.

* [320]

And it was ſaid, that multitude of precedents would make a law. 3. *Cro.* 326. *Cro. Car.* 520. and *Bredon's Caſe*; but ſeemed to approve of the exception; for he ſaid, that in avowry it would be ill to ſay that he demiſed ſuch land *inter alia*. *Vide* 2. *Cro.* *Bonner v. Corbet.*

The

Case 542. **The Duke of Ormond *against* Ireland.**

Bond to follow the ſuit with effect is not forfeited by ſuing an injunction.
S. C. poſt. 380.
S. C. Carth. 519.
S. C. Holt, 127.

A BOND was given to an officer conditioned, that the plaintiff in replevin would follow the ſuit with effect. Afterwards he ſued an injunction in the exchequer, whereby the proceedings were delayed.

But PER CURIAM, That is no forfeiture of his bond; nor nothing elſe is, but an abſolute determination of ſuit, as *nonſuit, non proſ. &c.*

Case 543. **Jenniſon *againſt* Ellis.**

Original of a different Term than the *placita*, no original.
S. C. ante, 235.

WANT of an original was aſſigned for error. And the original certified being of another Term than the *placita*, and no continuance,

THE COURT would not allow it for an original. *Cro. Car.* 281. 272. *Yelv.* 108. that it muſt be an original of the ſame Term with the pleading, or at leaſt pending the pleading.

Case 544. **The King *againſt* Sergeant.**

Non proſ. againſt one defendant no releaſe to the reſt.

VERDICT was againſt three jointly, and *non proſ.* entered as to one, and judgment againſt the other two. *Vide 6. Edw. 3. pl.* 31. 2. *Cro.* 211. *Co. Ent.* 172. 650. 676. 303. [illegible] that if there be ſeveral defendants, a *non proſ.* againſt one is no release as to the reſt. *Hilary Term, 3. Will. & Mary, Roll* 759 *vide Hutch.*

Case 545. **Anonymous.**

The [illegible] the county court [illegible] Lond[illegible] [illegible] Ld. Raym. 845. Ld. Raym. 1[illegible]

HOLT, *Chief Juſtice*. The huſtings is the county court in *London*, and the ſheriff may grant a replevin out of it as ſuch by the ſtatute of *Weſtminſter the Second.*

[illegible] Ld. Raym. 1[illegible]

* [illegible]

Case 546. *** Pierce *againſt* Hutcheſon.**

[illegible] [illegible] [illegible] [

PER CURIAM, Even in equity it would be no bar till ſa- Poſtea Paſch. 12. *Will.* 3. Duke of Ormond *v.* Brierly.
n; as if two be bound in a bond, judgment againſt one is
large to the other before ſatisfaction.

Regula Generalis. Caſe 547.

N occaſion of a diſpute between MR. HARCOURT, *Se-* Deed to be in-
ndary of the crown ſide, and LADY ASH, about the due rolled on the plea ſide of the court.
ent of a deed, a rule of Court was made, that all deeds S. C. Salk.
e inrolled on the plea-ſide, and acknowledged in the face
Court.

——— *againſt* Goudier. Caſe 548.

owed as a bailiff for rent; his being bailiff not tra- Bailiff traverſable.
erſable. *Per* HOLT, *Chief Juſtice (a).*

ere tamen.—See Bull. N. P. 55. W. Jones, 253. Culley *v.* Spearman, Rep. 386.

The King *againſt* Shortell. Caſe 549.

CTMENT was for *the reſcous* of one taken by proceſs of An indictment ſtating a writ returnable at *Weſtminſter* in *Surrey*.
narſhalſea, ſaid to be returnable *apud Weſtm. in com. Surrey.*
for this it was moved to quaſh it.

THE COURT would not intend but that there was a place
Weſtminſter in *Surrey*; therefore would not quaſh it.

Philips *againſt* The Biſhop of Saliſbury. Caſe 550.

) jointenants of an advowſon by deed made a partition to Jointenants of an advowſon may, by deed, make partition of it.
ſent by turns; and afterwards one of them granted over
; the grantee preſented in his turn, and * the biſhop re-
admit his clerk; whereupon the grantee alone brought a
pedit.

* [322]

THEW objected, that the inheritance of an advowſon was
ture indiviſible, and as intire as that of a villein; and that
ointenants of an advowſon agree to preſent by deed in
ns, ſuch agreement would work no ſeverance of the join-
: that remained; but if one of them after diſturb the other,
dy was by covenant; and quoted 2. *Mod.* 97. And he
: doubtleſs one jointenant, or tenant in common of an ad-
might make a voluntary partition of the right; after which
l have ſeveral writs of right of advowſon for their ſeveral
Fitz. N. B. 62. If there be two or more coparceners
or, they may make partition to have one part of the de-
meſnes

PHILIPS *againſt* THE BISHOP OF SALISBURY.

meſnes and ſervice to one, and another part to the other; and the advowſon by the ſame agreement to be by turns; it will be appendant to their reſpective ſhares. 6. *Co.* 12. 2. *Rol. Abr.* 255. *Fitz. tit.* "*Quare Impedit*," *pl.* 170. *Co. Ent.* 496.

And accordingly it was adjudged for the plaintiff, at another day, PER TOTAM CURIAM. 2. *Inſt.* 362. *Dyer*, 29. *Plowd.* 194. *F. N. B.* 62. 10. *Hen.* 4. *pl.* 10. *Co. Ent.* 496.

Caſe 551.

The King *againſt* Higgiſon.

An indictment for maintenance concluding *contra formam ſtat.* generally cannot be tried under a *mittimus* deſcribing it as on a *particular ſtatute*.

S. C. 1. Ld. Ray. 537.

INDICTMENT for maintenance, concluding *contra formam ſtat.* generally. The *mittimus*, whereby the record was ſent to be tried in the county palatine of *Cheſter*, was to try an indictment for maintenance *contra formam ſtatuti* of 32. *Hen.* 8. c. 9. And maintenance being made penal by the ſtatute of *Articuli ſuper Chartas*, and the 1. *Rich.* 2. c. 4.

IT WAS HELD that the matter was not duly tried, their power by the *mittimus* being confined to maintenance by the ſtatute of 32. *Hen.* 8. c. 9. and the indictment being at large: PER TOTAM CURIAM.

Caſe 552.

Mayor of Norwich's Caſe.

In caſe for falſe return to a *mandamus*, need not alledge they ought to obey it.

IN AN ACTION upon the caſe, for a falſe return to a *mandamus*, againſt the mayor and aldermen of *Norwich*, it was objected, that it was not alledged that it belonged to them to obey the writ.

But PER CURIAM, By their alledging a reaſon why they could not obey the writ, they admit that.

Caſe 553.

Anonymous.

Child and ideot follows father's ſettlement.

PER CURIAM. The child ſhall follow the ſettlement of its parent, unleſs he gain a diſtinct ſettlement; and before the ſtatute of 1. *Jac.* 2. *an ideot* could gain a ſettlement, * for till then notice was not neceſſary; but ſince he ſhall follow the ſettlement of his father.

* [323]

Carth. 433. 6. Mod. 87. Foley, 265. 11. Mod. 267. Mr. Conſt's edit. of Bott's P. L. 2. vol. 1. to 11.

Caſe 554.

The King *againſt* The Inhabitants of Kingſton Bowſey.

An order of removal *quaſhed*, is only final as to the pariſh concerned.

A POOR perſon was ſent, by order of two juſtices, from the pariſh of *St. Michael* to that of *Kingſton Bowſey*, and upon appeal the order was quaſhed.

And PER CURIAM, That judgment ſhall not bind the pariſh of *St. Michael* from ſending him to another place of ſettlement (*a*).

S. C. 1. Ld. Ray. 513. S. C. Carth. 316. S. C. Sett. & Rem. 277. S. C. Salk. 486.

(*a*) See Thackham *v.* Swindon, Salk. 489. Mynton *v.* Stoney Stratford, 2 Salk. 527. Swaincomb *v.* Shenſfield, 2. Salk. 492. Rex *v.* Biſhop's Walton, Foley, 275. Cirencester *v.* Coke St. Aldwin's, Burr. S. C. 17. Rex *v.* Fradenham, Burr. S. C. 394. Rex *v.* Bentley, Burr. S. C. 425. Rex *v.* Leigh, Cald. 59. and Mr. Conſt's edition of Bott's Poor Laws, to 818.

The

The King *againſt* Hoſkins. Caſe 555.

:EPTION was taken to an indictment for a reſcous. An indictment for a reſcous need not alledge the non-conſent of the plaintiff.

E FIRST EXCEPTION was, Becauſe it was ſaid, that it was
it conſent of the ſheriff; but it might be by conſent of the
or the plaintiff.

non allocatur (a).

E SECOND EXCEPTION, Becauſe the arreſt was not laid to be On indictment for reſcous, arreſt muſt be laid to be before the return of the writ.
return of writ; which was allowed good.

LT, *Chief Juſtice*, upon this occaſion ſaid, that a common
r a reſcous was four nobles.

ULD, *Juſtice*, ſaid, that in the common pleas they would
ne original action tried in a feigned iſſue, before they would
action for reſcous go on.

(a) Rex v. Warden of the Fleet, poſt. 337.

Pariſh of Bloxom *againſt* The Pariſh of Kingſton. Caſe 556.

ORDER OF SESSIONS was quaſhed, for that it was, that the Order quaſhed, not being certain.
erſon was "likely to become chargeable, as we are credi-
informed (a)."

This has been held too uncertain
llowing caſes: Rex v. Wykes,
138. Trowbridge v. Weſton,
473. Suddlecomb v. Burwaſh,
491. Reg. v. Waltham Magna,
Rem. 38. Reg. v. St. Mary Ottery, Sett. & Rem. 32. Stallingburgh v. Haxhay, 1. Seſſ. Caſes, 131. But now by 35. *Geo.* 3. c. 101. no perſon ſhall be removed until they become actually chargeable.

Pariſh of Grindon, in Northamptonſhire, *againſt*. Caſe 557.
The Pariſh of Overcott, in Warwick.

ONDITIONAL ORDER was made, "in caſe the court of Order conditional quaſhed.
king's bench ſhould be of opinion, that, where a ſervant
hired at a fair ten days after *Michaelmas* until *Michaelmas*
t, ſuch hiring and ſervice did gain a ſettlement, then, &c."
r this the order was quaſhed.

* Huſſey *againſt* Fiddall. Caſe 558.

:OR of a judgment in the common pleas, in an *indebitatus* If goods be ſold by a bankrupt after the act of
ſumpſit by the aſſignee of a commiſſioner of bankrupt.

tcy committed, his aſſignees may affirm the contract, and bring an *indebitatus aſſumpſit* for
, or diſaffirm the contract and bring *trover* for the *goods*.—S. C. Holt, 95. S. C. 3. Salk. 59.

The

HUSSEY *against* FIDDALL.

The exception was, That it was for goods ſold after the bankruptcy committed; and the action ſhould be *trover*, and debt would not lie therefore, becauſe trover might be brought for it again.

HOLT, *Chief Juſtice.* They may avoid the ſale, if they will, and bring *trover* for the goods; but if they bring the one, they ſhall not afterwards bring the other. By the act of bankruptcy the property of the goods is in the bankrupt's creditors (*a*); and if it be a *choſe in action* that is aſſigned, the aſſignee is to have the ſame remedy for it as the bankrupt himſelf might have had; as if it be money received to the uſe of the bankrupt, they are to have ſuch remedy as he might have had for it; and without doubt the action well lies here, and even a general *indebitatus* would have done.

NORTHEY, *at the Bar.* If a man receive a thing to my uſe, I may ſay that it was received to my uſe, and bring the proper action in ſuch caſe; or, without any ſuch ſuggeſtion, bring trover.

HOLT, *Chief Juſtice.* *Indebitatus* was brought for money received upon a uſurious contract; but it was held that it would not lie (*b*); and KEYLING, *Chief Juſtice*, would allow it againſt a receiver or factor, but HALE, *Chief Juſtice*, would not. By my conſent it ſhall go as far as it has gone, but not a ſtep farther. It has been held to lie for *a fine* by cuſtom (*c*); but ſurely that was hard, for it was to leave matter of law to a jury.

Vide 1. Sid. 223.

But NORTHEY ſaid, ſome ſtrains had been in favour of remedy; and he ſaid, that if a man, pretending title to my land, receive my rent, and get my tenants to attorn to him, an *indebitatus* had been maintained for the money.

Which HOLT, *Chief Juſtice*, agreed; but ſaid, that had been very hard too.

(*a*) The property of every part of the bankrupt's eſtate is, by the act of bankruptcy and aſſignment, ſo fully veſted in the aſſignees, 2. Bl. Com 485. that the bankrupt is not entitled to recover from his eſtate even the neceſſary ſubſiſtence for himſelf and family, except by the favour and indulgence of the aſſignees and creditors, Thompſon, Aſſ. of Nelſon, *v.* Councell, 1. Term Rep. 157.; and the creditor of a bankrupt in *England*, who, ſubſequent to the bankruptcy, recovers a debt due to the bankrupt in a foreign country by proceſs of attachment in that country, is not entitled to retain the money ſo recovered to his own uſe, and therefore the aſſignee may recover it in an action of aſſumpſit as money had and received to their uſe for the benefit of the creditors, Hunter, Aſſignee of Blanchard and Lewis, *v.* Phillips, 4. Term Rep. 182.; and this adjudication was confirmed on a writ of error to the exchequer chamber, 2. H. Bl. Rep. 402.

(*b*) See Tompkins *v.* Perrat, 1 Salk. 22. Smith *v.* Bromley, Dougl. 697. and 1. Term Rep. 286.

(*c*) Shuttleworth *v.* Garnet, 3 Mod. 239. 1. Show. 35. Comb. 148. Grant *v.* Aſtle, Dougl. 728.

Anonymous

Anonymous.

Case 559.

who was ſummoned before a Judge, to ſhew cauſe why *com-n bail* ſhould not be taken, did not come; whereupon a day en for him to come, or elſe that common bail ſhould be; he before the day, and conſents to common bail, which was ngly filed; and at the day came to make oath of a debt en pounds.

Common bail being regularly filed, oath of debt being above 10l. not to be received.

PER CURIAM, It ought not to be received, bail being re-filed.

* [325]

The King *againſt* The Town of Hartford.

Case 560.

e caſe of the information againſt the town of *Hartford*, after as filed, at another day, the Court was moved to ſtop it, if ere not ſecurity for coſts according to the late act of parlia-

Information filed, though no ſecurity for payment of coſts, ſhall not be ſtopped.

T, *Chief Juſtice*. I doubt me you are too late after the in-on filed, eſpecially by motion, but perhaps you may plead it.

Anonymous.

Case 561.

HOLT, *Chief Juſtice*, at *niſi prius*. If a ſhip be inſured ler *Captain J. S.* the part-owners may change the captain notice to inſurers (*a*).

Captain of a ſhip inſured may be changed without notice to inſurers.

ere tamen, for it might be the e and knowledge of the captain an encouragement to the in-

ſurers.—NOTE *to the former edition*: See Park on Inſurances, 19. 290.

Anonymous.

Case 562.

SOLICITOR GENERAL moved for leave to enter a *non of.* upon an information, in order to file another.

A ſecond information not to be filed till the firſt be diſcharged. Ante, 319.

SAM. ASHTREE, *the Maſter of the Crown Office*, ſaid, the was to come to him, and pay coſts upon the information, and enter a *non proſ.*

PER CURIAM, You ſhall not file a ſecond before the firſt arged.

——— *againſt* Deer.

Case 563.

OHIBITION was moved for to the conſiſtory court of *andaff*, where a libel was for fraudulently taking away a will s proved with them there, in order to cheat the legatees.

Libel lies in the ſpiritual court for fraudulently taking away a will which had been proved, with intent to cheat the legatees.

GOULD,

——— *againſt* Dean.

GOULD, *Juſtice*. Here is a will properly lodged, and if any fraudulently take it away, what remedy have they? for an indictment or information will not reſtore them the will; and detinue will not lie for them, becauſe they have no intereſt in it.

TURTON, *Juſtice, accord.*

HOLT, *Chief Juſtice, contra.* The probate is authority enough for them to go on, though the will be loſt; and the offence need not go unpuniſhed, for they may have indictment or information; and this is not like caſes of beating in the church-yard, where the ſtatute gives them power, though it be puniſhable at common law; nor beating in the church itſelf, where they proceed *pro reformatione morum* only.

And no prohibition went.

* [326]

Caſe 564.

* Oldham *againſt* Rightſon.

Mortuary may be ſued for in the ſpiritual court, if cuſtom be not denied.

Cro. Eliz. 151. Cro. Car. 258. 3. Mod. 268. Lutw. 1069.

A MORTUARY was ſued for in the ſpiritual court of *Chester*, and a prohibition was moved for, upon ſuggeſtion, that there was no cuſtom to pay mortuary in that pariſh.

And it was agreed, they may ſue for mortuaries in the ſpiritual court, if it be admitted there is any due (*a*); but the ſtatute of *Circumſpecte Agatis* makes no more proviſion for mortuaries than it does for tithes, or a *modus* of them; and in a ſuit for a *modus* the cuſtom may be traverſed. *Hob.* 247. If in a ſuit for a *modus*, the *modus* be admitted, they ſhall proceed; *ſecus* not. *Cro. Eliz.* 151. *Cro. Jac.* 257. and the caſe of *Brown v. White* (*b*), it was a controverted point; but then it was a more difficult point to obtain a prohibition than it is now that ſtatute give coſts; and then the Court would not grant a prohibition without oath of the truth of the ſuggeſtion. *Vide* 2. *Keb.* 835. 867. where it is admitted they may ſue for a mortuary, unleſs the cuſtom be denied.

And THE COURT was for granting the prohibition, it being a doubtful point, to have it ſettled; and that the being of coſts ſeemed to be a notable ingredient in the caſe; and the ſtatute of 21. *Hen.* 8. c. 6 provides that they ſhall demand no more than they had by cuſtom; which though it be reſtrictive of their juriſdiction, yet ſhews they have juriſdiction of mortuary.

But the other ſide offering affidavits of uninterrupted uſage,

HOLT, *Chief Juſtice*, ſaid, that might be ſomething; for though there were a good ſuggeſtion made, yet, if it appeared to them to be merely for delay, they would not grant a prohibition; and that was the reaſon of the rule of requiring affidavit of the truth of ſuggeſtion.

(*a*) See Torrent v. Burley, 2. Stra. 715. (*b*) Ray. 75. 1 Lev. 56.

Anonymous

Anonymous. Caſe 565.

the courſe of the Court after affidavits are filed on both ſides, and a day given for the hearing of Counſel, there ſhall be no ones read, but ſuch as are affirming the old ones; which it to contain no new matter.

Reading affidavits.

Anonymous. Caſe 566.

OLT, *Chief Juſtice.* An officer in *London* may take away ſome parcel of the party's goods to compel an appearance; it muſt be a reaſonable parcel; and upon attachment of goods e, the cuſtom is to leave them in the party's hands till the ter be determined.

Appearance compelled by diſtreſs.

* Hamley *againſt* Hendon. Caſe 567.

OVENANT upon a deed of demiſe by the plaintiff's teſtator to the defendant of ſeveral parcels of land, reſerving rent and of court, in which the leſſee covenanted to grind all his corn grains that he ſhould ſpend in domeſtic uſe, at the mill of the r's manor; and breach aſſigned, that there were five hundred els of wheat ground and uſed in the defendant's houſe which id not grind at the ſaid mill, or any part of them: and to this murrer.

A covenant to grind *all his* corn at the lord's mill is not reſtrained to ſuch corn only as grows on *his* premiſes.

IRST OBJECTION. This covenant, by operation of law, exs only to ſuch corn as ſhould grow upon the premiſes, and it t averred to be ſo; and for this was quoted 1. *Sid.* 374.

UT PER CURIAM, The covenant is expreſs and general of "all s corn, which he ſhould grind for the uſe of his houſe," and ing appears to reſtrain it againſt the words.

ut upon ANOTHER EXCEPTION, *viz.* That it was not averred, the corn was his at the time of the grinding, and it might be her's at time of grinding, and after bought by the defendant, ſo not within the covenant; the meaning and words whereof is that he ſhould grind *all his* corn which he ſhould uſe in his e at the plaintiff's mill; for the defendant might have a mill is own, and grind another's corn there, and afterwards buy it is houſe;

A breach of covenant for not grinding *all his* corn at the plaintiff's mill, muſt alledge that the corn was the defendant's.

dgment was given for the defendant.

Blank *againſt* Newcomb. Caſe 568.

IBEL was in the ſpiritual court for not paying a pariſh-rate for repairs of the church; and it was ſuggeſted for a prohi- n, that all pariſh-rates were to be by a majority of the pa- riſhioners;

The ſpiritual court cannot make a rate, but may excommunicate for not making one.—S. C. Holt, 594.

BLACK *against* NEWCOMB.

riſhioners; and that every rate, after it is collected, becomes v and that this was not by a majority, &c. and that the ſuit w pay this in purſuance of an old rate collected many years befo

As to THE FIRST it is urged, its not being by majority of pariſhioners was a matter only proper for *an appeal*, and ſo is inequality of the rate. 2. *Bulſt.* 289.

As to THE SECOND, that this preſent rate had indeed refer to a former one which had been collected, but that was not

* [328] give any force or efficacy to the former, but * only by way of rection of the latter, according to *Sir Rob. Lee's Caſe.*

HOLT, *Chief Juſtice.* The right courſe is for the ſpiritu court to give ſufficient notice to the pariſh to meet, and make rate for the reparation of the church, which if they do not t they may be *excommunicated*; but the eccleſiaſtical court cann make a rate, or appoint commiſſioners to do it; and here the ſu geſtion recites an antient rate, which, they ſay, was to be ſtanding order for all times to come; and that they have confirm that rate; and that the libel is for want of a new payment accor ing to it. *Vide Noy*, 131. 126. in point, for a prohibition in th caſe; and all that the ſpiritual court can do is to make an ord that the church be repaired, but not to aſſeſs a *quantum*. As though in the ſpiritual court one omits in the libel that which do againſt him, as here, that the rate was made by commiſſioners the eccleſiaſtical court, yet they of the other ſide may ſuggeſt it

And here a prohibition was granted.

Caſe 569.

Anonymous.

Suit may be againſt a man both as heir and executor.

2. Bro. 97.

HOLT, *Chief Juſtice.* One may be ſued as executor a as heir both; for why may not a man make uſe of both ſecurities.

See 3. & 4. *Will. & Mary*, c. 14.

Caſe 570.

The King *againſt* Speed.

If a conviction before juſtices of peace on a penal ſtatute be removed into the court of king's bench and affirmed, th. penalty can only be levied by a writ of *levari facias* out of that court, for the record cannot be remanded to the juſtices.—And offender's goods muſt not only be ſeized, but ſold by virtue of ſuch writ, although the ſtatute which he was convicted only ſays that the forfeiture "ſhall be levied by way of diſtreſs."—1 Salk. 379 S. C. Carth. 502. S. C. 1. Ld. Ray. 583.

A CONVICTION for deer-ſtealing againſt him being moved up by *certiorari*, and affirmed here (*a*), a *levari fac.* iſſued out to levy the money.

EYRES moved to ſuperſede that proceſs, as irregular:

FIRST, Becauſe this is made a particular offence, and puniſhable in a preciſe manner, and ſtrictly according to the words the ſtatute, being againſt MAGNA CHARTA; and therefore

(*a*) See S. C. 1. Ld. Ray. 584.

ve the aid of the proceſs of this court to levy the money, no than they ſhall have the help of indictment or information nally. THE KING *againſt* SPEED.

CONDLY, If this courſe ſhall hold, the act will be more penal was deſigned; for thus his goods in any county in *England* be liable, whereas the ſtatute only ſubjects his goods in the ty where the offence is committed; for if there be none in ounty where this proceſs is directed, and that be returned, *et.* may be, and thereupon a *levari* into any other county,

IRDLY, The ſtatute directs the money ſhall be levied by war- which is not purſued.

URTHLY, The proſecutor himſelf may remove the convic- und intitle himſelf to this proceſs; and for aught appears to ourt it was ſo here. *Vide Hutt.* 117, 118.

FTHLY, At * this rate the offender may be doubly puniſhed; * [329] ppoſe the ſheriff levies twenty pounds, ſtill the party ſhall be to a year's impriſonment, and pillory beſides; for the ſtatute is it ſo in caſe of failure of diſtreſs to the value of thirty s, which inconveniency would not enſue in caſe of proceſs conſtable; for the conſtable, in caſe of failure of diſtreſs to ll value, ſhall not ſell the goods, as the ſheriff muſt; ſo the after he has undergone the puniſhment of impriſonment, &c. ave his goods again; and he quoted a caſe in *Michaelmas* in the twenty-third of *Charles the Second*, 2. *Keb.* ——— *ton.* If any proceſs may be awarded out of this court, it be *a diſtreſs*; the words of the ſtatute directing it to be "by of diſtreſs of the goods of the offender," without ſaying, reſs and ſale of goods," and in ſuch caſe the officer ſhall not or where an act has a known term in law, it ſhall be inter- according to the law's acceptation of ſuch term; and diſ- or rent at common law was not to be ſold, but to remain in : of a pledge; and ſo here it ought only to be, in order to e a payment. *Dyer*, 280. in caſe of return irrepleviſable, owant ſhall not ſell. 4. *Hen.* 6. *pl.* 17. 1. *Rol. Ab.* 887. t be recovered in a court-baron, they can only diſtrain, but ll, but only detain it till payment: and it is made a doubt, if *iorari* be of a judgment in an inferior court of record, this ſhall award execution. 1. *Keb.* 733. If diſtreſs be given enal ſtatute, it ſhall not be ſold; and therefore it is that ſtatutes do expreſsly put in the words "diſtreſs and ſale of ds;" and that the ſtatute of 43. *Eliz.* hath thoſe words. 92. That commiſſioners of ſewers may ſell, though there ſuch words, but the ſtatute has words tantamount; for it is, the amerciament ſhall be levied, and the party puniſhed ording to their diſcretion;" and beſides that, they may pro- ccording to the cuſtom of *Rumney-Marſh*, by which the s may be ſold; and here they are not without remedy, for

THE KING *against* SPEED.

the Court may send their mandate to a justice of peace to issue a warrant for levying by distress.

2. Jo. 421. 2. Cr. 497.

HOLT, *Chief Justice*. Where one intitles himself to a duty and remedy by prescription, he must set out his remedy wholly. Indeed if you prescribe to a duty, you may have debt for it without prescription, but you cannot distrain without it; and if you prescribe to duty and distress, you cannot, by virtue thereof, sell, without a prescription for selling too, because a prescription may be to distrain without selling. * But by your argument, Mr. EYRES, the *certiorari* would defeat the whole proceeding and conviction; for though the conviction be confirmed, you would have it that *the justices* cannot give a warrant, the record being here; and if *we* cannot award execution, there is an end of the matter: but by necessary consequence of law, whensoever there is a particular jurisdiction erected, an appeal lies from it to this court; if there be no judgment below, there will be no need of a *certiorari* in this case; and if there be one, then shall one go: And we, you say, cannot award execution; surely that would make a failure of justice; and we have a power to confirm, as well as to reverse or quash; and if so, by necessary consequence we have a power to award execution of what we confirm; for below nothing can be done; because the record is here. To say, that, at this rate, the money may be levied in another county, is not the case before us, for here the process is into the county where the fact was committed; so you come too soon for that objection; but if no *bona* had been returned, and a *testatum* had issued, there then had been some colour for your objection. When a statute says money "shall be levied by distress," this is an execution, *Rast. Entr.* 175. "Levied by distress," is a special plea, and so is "*nil de-*"*bet.*" If a man has rent due to him, he has his election to bring debt, or to distrain; and if he bring debt after distraining, the defendant may plead "levied *per* distress," for by distraining he has determined his election for that time; for otherwise he might have two judgments, *viz.* "Return irrepleviable," and "Judgment "in debt;" to avoid which he may in that case plead "levied by "distress." But *quære*, if he had distrained, and the cattle died in pound, PER MOY. But distress in a leet of common right may be sold, because it is a court of record; otherwise of distresses in courts that are not of record. As to commissioners of sewers, that is a special power given them, and in consequence of that they may sell. And *Callis* takes great pains to prove that they are a court of record (*a*); and though some acts, that order things to be levied by distress, have also the words "and sale," yet no necessary inference can be made from that, for statutes very often express matters more plainly than they need, for greater caution.

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NOTA HOC.

Vide 8. Co. 41. b.

ET PER CURIAM, Here the process is regular, and the goods may be sold.

(*a*) See Pritchard *v.* Stephens, 6. Term Rep. 522.

Note

irther, PER TOTAM CURIAM, That if all the ſum were ſmall matter, yet the party for default thereof ſhall the corporal puniſhment too, *viz.* the pillory, and iſonment. THE KING *againſt* STEED. * [331]

of Shandrigamy *againſt* The Vill of Sholedam. Caſe 571.

Chief Juſtice. Commiſſion of ſewers to defend the m againſt the ſea is very ancient, and even by ſpecial in ſome caſes; but ſewers for melioration of land are rliament. Commiſſion of ſewers. S. C Holt, 643.

Anonymous. Caſe 572.

Chief Juſtice. "By" and "from" are ſynonymous

Anonymous. Caſe 573.

Chief Juſtice. Treſpaſs may be joint or ſeveral, as intiff pleaſes; though the fault be the ſame in reſpect t is ſeveral as to the agents, becauſe the act of one is of the other. Treſpaſs.

Anonymous. Caſe 574.

moved to quaſh an indictment againſt *A.* for that *ruit magiſtratos civitat. de* LICHFIELD *fore ſocietatem*

KCEPTION, That it was *magiſtratos*, there being no

Y, That it was not a direct allegation that they actually ut by a *fore*.

T, *Chief Juſtice*, ſaid, that if they had not reputation cure themſelves from ſuch an aſperſion, he would be dant's opinion too; and it was quaſhed. It is not indictable to call the magiſtrates of a city a *ſociety of aſſes*. 1. Roll. Abr. 56. 1. Vent. 50 258. Cro. Jac. 59. 1. Sid. 67. 1. Lev. 52. 2. Salk. 695. Palm. 21. Stra. 1169. 2. Ld. Ray. 1396.

The King *againſt* Thomſon. Caſe 575.

ENDANT being of good reputation, and riding in the guards, was taken by the hundred for a robbery, on lay; and it being feared he ſhould be too violently In *felony* after an indictment found and removed, the

ay order a *trial at bar*.—S. C. Holt, 702. 1. Stra. 52. 644. 2. Stra. 816. Sayer's eam Rep. 363. 367. Tidd's Pract. 555.

THE KING *againſt* THOMSON.

proſecuted, that the hundred might diſcharge themſelves by his conviction, A TRIAL AT BAR was moved for.

And by HOLT, *Chief Juſtice*, It has been uſed to grant trials at bar in like caſes. But there being no bill found, he ſaid they could make no rule; but if there had been a bill, he ſaid then it might be removed by *certiorari*, &c.

And he ſaid, there was one way to ſue a ſpecial commiſſion to find a bill, and even ſo there muſt be proceſs, and fifteen days between its *teſte* and return, and return to be on common day; and he ſaid he knew one *Holt*, an attorney, who had narrowly eſcaped being hanged at *Cambridge* aſſizes, becauſe he was like one *Ambroſe Holland* a highwayman.

* [332]

Caſe 576.

* The King *againſt* The Town of Andover.

Mandamus cannot be joint.

S. C. Salk. 433. S. C. Holt, 441. Poſt. 349.

FIVE of the members of the corporation being turned out, ſued a joint *mandamus*; and afterwards had it quaſhed, upon their own motion, becauſe they could not join, for that the wrong done to the one is no wrong to the other (*a*). PER CURIAM.

5. Mod. 10, 11. 1. Sid. 209. 6. Mod. 18. 7. Mod. 83. 8. Mod. 209. 1. Show. 158. 1. Bl. Rep. 60.

(*a*) Butler *v.* Rews, poſt. 349. Rex *v.* Mayor of Kingſton, 8. Mod. 289. Rex 1. Stra. 578. But ſee Rex *v.* Lord Montacute, 1. Black. Rep. 60.

Caſe 577.

Maſon *againſt* Keeling.

A declaration in an action on the caſe for an injury done by the defendant's dog, muſt ſtate that *he knew* (*a*) the dog was of a miſchievous nature, or had done miſchief before; for ſtating that he was a mongrel maſtiff *valde ferox*, and not muzzled, and that he *juvenis et violenter impetivit et grave vulnus momordit et vulneravit* the plaintiff, &c. is not ſufficient.—S. C. 1. Ld. Ray. 606.

ACTION ON THE CASE; in which the plaintiff declared, that on the twentieth of *June*, in the eleventh of the King, the defendant *quendam canem moloſſum valde ferocem* did keep, and let him go loſe unmuzzled *per publica compita*; ſo that *per defectum curæ* of the defendant, the plaintiff was bit and worried by the ſaid dog, as he was peaceably going about his buſineſs in ſuch a ſtreet. There was another count, in which it was laid, that the defendant knew the dog *ad mordend. aſſuet.* To the firſt count there was a demurrer, and to the ſecond not guilty.

And it was ſtrongly inſiſted, that the laying it to be *canem valde ferocem*, and ſuffered to go about the ſtreets unmuzzled, and *per defectum curæ*, ſupplied the want of *ſciens*, &c. for it was ſaid to be part of the excellency of the law of *England*, that it leaves no man without a remedy, that has ſuffered a wrong through the fault of another. It was agreed there were *damna abſque injuriâ*, but that only was when it happens without the commiſſion or omiſſion of

(*a*) See Kinnion *v.* Davis, Cro. Car. 487. Bolton *v.* Banks, Cro. Car. 264. Buxenden *v.* Sharp, 2 Salk. 662. Jenkins *v.* Turner, 1. Ld. Ray. 110. Smith *v.* Pelah, 2. Stra. 1264.

any

MASON against KEELING.

but never when there is neglect in another, through which I amnified. And the rule of "*actus non eſt reus niſi mens ſit a*," holds only in capital offences; and therefore if an infant lunatic commit a treſpaſs, they ſhall anſwer it in damages, ret it cannot be ſaid to be *ſcienter*. *Hale's Pl. Cor.* 53. "If e keep a beaſt uſed to ſtrike, and it kill a man, it is holden by ne to be even felony, but by others to be only a great miſde- anor;" and the neglect without knowledge, where damages , ſubjects the party to action. A ſoldier at his exerciſe diſ- ging his gun hurt another, though pleaded to be *involuntarie r infortunium*, yet action lay (*a*); and the rule in *Chief Juſ- Jones* 205 is, that nothing but an unavoidable neceſſity ſhall ſe from repairing an injury to a third perſon through his de- ; and here was no neceſſity for the defendant's keeping *tem valde ferocem*, much leſs to let him go unmuzzled about treets; and it is laid in the declaration, and confeſſed by the rrer, to be *pro defectu debitæ curæ* of the defendant, and that s *valde ferox*: and this opportunity is given by the defend- o ſuch creature to do miſchief; what then can there be more nable, than to repair the wrong? There is no default in the tiff, for he was going about his lawful occaſion; and there is y a great fault in the defendant to let ſuch a fierce creature the ſtreet of *London* unmuzzled. Nothing is more proba- han that ſuch a dog as this let looſe among a crowd of people lo miſchief; and it would be needleſs to give notice of its ; likely to do ſo, and like telling a man that fire would burn, tiger would do miſchief; and this is within the ſame reaſon an action for negligent keeping his fire, for that is *pro def. . cuſtod.* of fire, and this *pro def. debit. curæ* of his dog; and aſe of fire is a much harder one, for there is none but muſt his ſervant with fire, and the accidents are many. In *nt.* 295. notice is taken of a caſe which happened before time, and was this: A butcher let looſe an ox, and it was laid, for want of the due penning of his ox the plaintiff was hurt , and there the action lay for want of due penning of his ox; this is for want of due care of his dog; and here is equal ect of miſchief in both caſes. If a man have an unruly horſe h breaks through his cloſe or ſtable and does miſchief, an ac- will lie for it; and it is hard that one ſhould have a remedy he leaſt treſpaſs done in his land, and none for a treſpaſs done to his perſon by wounding or maiming. Suppoſe one keep al maſtiffs, ſhall he be exempt from an action for miſchief by every one of them, till he knows that he has done a prior nief that is, no care is to be taken to prevent the firſt miſ- ? This ſeems to be contrary to the policy of the law, which nts more in preventing than puniſhing; and the maxim is, *tat cautela quàm medela*. It is objected, that if an action be tenanced upon this declaration, a lap-dog or ſpaniel ſhall not

Dalt. c. 93.

* [333]

(*a*) Hob. 134.

MASON *againſt* KEELING.

ſnap at a man, but an action ſhall be ſtraight brought for it; and ſo it will introduce a multiplicity of actions, which the law abhors. But I anſwer, that there ought to be "*ſciens, &c.*" or that which is tantamount, that it was *ferox*, as here, and then no inconvenience. * It is alſo objected, that the precedents are all "*ſciens, &c.*" But I anſwer, that would be an aggravation of damages; and precedents imply only that it would be the ſurer way ſo to do, but not that *ſciens* is abſolutely neceſſary. It is ſaid, that it is neceſſary in caſe of an action for biting ſheep, and therefore *a pari(a)*. See 20. *Edw.* 4. *pl.* 11. ſo *per Townſend*; but there it is not denied, but that if a dog of *A.* chaſe the ſheep of *B.* into the ſoil of *C.* whereby an action is given to *C* againſt *B.* that *B.* ſhall have an action againſt *A.* And there is no compariſon between the biting of cattle and biting of a man, for the law has a greater regard to the life and ſafety of a man than of a beaſt; and everybody is preſumed to know that a dog *valde ferox* will be apt to do miſchief, if let looſe in a ſtreet among a crowd of people. But it is alſo objected, that it may be puniſhed by *indictment*; and I believe it may; and from thence I infer this action will lie by any that has a ſpecial damage, as in 1. *Inſt.* 56. *a.* and it is a true maxim, "*Quod quiſque debet ita uti ſuo, ut alteri non noceat.*"

* [334]

RAYMOND *contra.* Some Books ſay, that the law takes notice of the nature of a maſtiff, and that is, that he is tame and domeſtic, or converſant with man, and therefore an action does not lie for the biting of ſuch a dog without a *ſciens.* What is it then can diſtinguiſh this caſe from that? It is ſaid that this was a mongrel cur *valde ferox*, and that letting looſe in a highway is a public nuſance; and even in that they fail, for they only ſay that he let him looſe *per compita*, and that does not neceſſarily ſignify a ſtreet or highway; for *Latin* authors uſe it for a court or yard before a man's door; nor do I know of any authority that it is a nuſance to let a dog go at large: And there is a diverſity between an ox that ranges the field, far from the ſociety of man, and a dog, which is *animal domeſticum*, bred among them, and therefore cannot be preſumed to be prone to miſchief as the other. And they cannot ſay that it is the nature of dogs to be fierce; and to ſay that an averment of its being fierce will ſupport an action, is to oppoſe the whole current of authorities, which all require *ſciens*; and it might be fierce and the owner know nothing of it, for they do not aver he did know him to be fierce. And as to the rule of law, that no man's wrong ſhould be left remedileſs, there are few rules without exceptions; and the caſes of *Holart* and *Jones* are not like this, for every-body knows that a gun charged, if it go off, is apt * to do miſchief, but not ſo of a dog. And an indictment would not have laid here without a knowledge of the ill quality.

Dyer, 25 b. 29. a.

* [335]

GOULD, *Juſtice.* No doubt but in the caſe of ſheep there ought to be a *ſciens*, becauſe that is an accidental quality, and not

(a) *Vide* 20. *Edw.* 4. pl. 11.

in

he nature of a dog. And as to property of a dog, the Books inguiſh; for a man has a property in a dog that is *a maſtiff* or *iel*; for the one is for the guard of his houſe, the other for his ſure; but this here is *a mongrel*, and laid to be *valde ferocem*, that muſt be an *innate* fierceneſs, and not accidental; and if a be *aſſuet.* to bite cows, and the maſter know it, that will not ufficient knowledge to make him liable for his biting ſheep. ides, this caſe is diſtinguiſhable in reſpect of the place, for the takes notice of highway, and is a ſecurity for paſſengers; and ould be dangerous to keep ſuch dogs near the highway, where ſorts of people paſs at all hours; and to maintain this iſſue, they ſt give a natural fierceneſs in evidence.

HOLT, *Chief Juſtice.* If it had been ſaid, that the defendant w the dog to be *ferox*, I ſhould think it enough. The differe is between things in which the party has a valuable property, he ſhall anſwer for all damages done by them; but of things in ch he has no valuable property, if they are ſuch as are naturally chievous in their kind, he ſhall anſwer for hurt done by them hout any notice; but if they are of a tame nature, there muſt notice of the ill quality: and the law takes notice, that A DOG ot of a fierce nature, but rather the contrary; and the preſumpn is againſt the plaintiff; for can it be imagined a man would p a fierce dog in his family wittingly? If any beaſt in which I e a valuable property do damage in another's ſoil, in treading graſs, treſpaſs will lie for it; but if my dog go into another n's ſoil, no action will lie. See the caſe of *Millan v. Hawe (a)*, that *ſcienter* is the *gîſt* of the action; and ſo is 1. *Cro.* ere it was doubted whether the *ſcienter* ſhould go to the keeping quality; nor does it appear here but it was an accidental rceneſs: or ſuppoſe it were an innate one to this dog particularly, d it had been given to the owner but an hour before, ſhall he e notice of all the qualities of his dog at his peril, or ſhall he ve his action againſt the giver for beſtowing him a naughty dog? caſe a dog bites pigs, which almoſt all dogs will do, a *ſcienter* is ceſſary *(b)*. And I do not doubt but if it be generally laid that log was uſed to bite *animalia*, * and the defendant knew of it, it ll be enough to charge him for biting of ſheep, &c.; and by *imalia* ſhall not be intended frogs or mice, but ſuch in which the intiff has property. * [336]

And judgment was given for the defendant by HOLT, *Chief ſtice*, and TURTON, *Juſtice*; GOULD, *Juſtice*, *mutante opiem ſuam (c)*.

) 1. Jones, 131. Poph. 161. h, 13. 119.
) 1. Cro. 255.
) *Sed quære*; for in S. C. 1. Ld. Ray. 608. it is ſaid, the caſe was adjourned, and that afterwards the parties agreed, and therefore no judgment was given.

Case 578. **Crouch's Case.**

Soldier arrested must find common bail, and plead the statute in his discharge.

HALL, moved to have him discharged upon the late act of parliament for disbanding the army, whereby soldiers are exempted from suits for three years upon affidavits.

HOLT, *Chief Justice.* All we can do is to order *common bail*; but he must discharge himself of the action by pleading the act, &c.; and the plaintiff may traverse his allegations.

And so was the rule.

Case 579. **Anonymous.**

Names of the two justices need not be specified.

PER CURIAM. FIRST, If an order be by two justices, and it said, their names need not be mentioned (*a*).

Appeal to the next sessions.

And, SECONDLY, The next quarter-sessions to which the appeal must be is the next after the party is grieved (*b*).

(*a*) Rex v. West, 6. Mod. 180. Billings v. Prince, 2. Bl. Rep. 1017. 1. Const. 426.

(*b*) See 43. *Eliz.* c. 2. s. 6. 17. Geo. 2. c. 38. Rex v. St. Giles, 11 Mod. 222. Rex v. Poor of Canterbury, 4. Burr. 2230. Rex v. Cobbe, 1. Const's P. L. 236. Rex v. Mickkfield, 1. Const's P. L. 239. Rex v. Atkins, 4 Term Rep. 12. and Const's P. L. 1 vol. 444, 446. 2 vol. 834, 835. 838.

Case 580. **Anonymous.**

Construction of the statute against Gaming. Ante, 258.

HOLT, *Chief Justice.* If one lose one hundred pounds to one, and afterwards one hundred pounds to another, at one sitting, both debts are lawful, notwithstanding the statute. So if a man lose five hundred pounds ready money, and one hundred pounds upon tick, both are good. And if there be two sharpers, and one of them get one hundred pounds, and give over, and then another takes him up, who wins another hundred pounds, both are good; for as they were sharpers, he was a rake, and ought to learn wit by being bit; and they are distinct facts.

BUT NOTE, I have heard TREBY, *Chief Justice* of the Common Pleas, deliver a quite contrary opinion in the case where two win successively, because at that rate the statute, which ought to receive a favourable interpretation in suppression of vice and gaming, would be easily evaded (*a*).

(*a*) See ante, 258.

Case 581. **Anonymous.**

Custom of the town of *Dartmouth.*

HOLT, *Chief Justice.* The custom of the town of *Dartmouth* is, that if one serve his time, and learn a trade there, he is not thereby free, but the Corporation have power to make what they

they pleaſe free. It is an extraordinary cuſtom, but who can help it? ANONYMOUS.

Anonymous. Caſe 582.

HOLT, *Chief Juſtice.* In granting a new trial we ought not altogether to rely on the certificate of the Judge who tried the cauſe, but upon the reaſon of the thing; and ſometimes I would grant a new trial againſt the certificate of a Judge, if in my judgment and conſcience the matter deſerves a re-examination.

The Judge's report not to be entirely relied on in a motion for a new trial. Tidd's Pract. 559. 606.

* Anonymous. Caſe 583.

HOLT, *Chief Juſtice.* I never liked the exception of "*pro* "*com.*" in outlawry, though it has been one before I was born; but ſurely the firſt that obtained it had good luck (*a*). Outlawry.

(*a*) See Rex v. Wilkes, 4. Burr. 2564. where all the caſes on this point are collected, and Rex v. Barrington, 3. Term Rep. 500. where one of the learned Judges is of opinion with HOLT, *Chief Juſtice.*—See alſo 5. Term Rep. 204. and 4. Hawk. P. C. 7th edit. ch. 27. page 189.

The King *againſt* The Warden of the Fleet. Caſe 584.

AT A TRIAL AT BAR of iſſues joined, in pleading on a MONSTRANS DE DROIT *in chancery*, to an inquiſition returned there, finding ſeveral miſdemeanors in THE WARDEN in the execution of his office, which office is found to be an antient office exerciſable in *Middleſex*; whereby the ſaid office, and the priſon-houſe in *London*, which were found to be appendant to the office, were forfeited; It is not a good cauſe of challenge to THE ARRAY, that the jury ſhould have come from a different county. S. C. Hok, 133.

There were two iſſues, one upon the eſcapes, the other upon the appendancy in *London*.

A jury of *Middleſex* being come to the Bar,

THE COUNSEL *of the defendant* challenged THE ARRAY, and had it drawn up in parchment in *French*, and read by Counſel. The cauſe was, that the jury ought to come from *London*, where the houſe was, and not from *Middleſex*, and returned by the *London* ſheriff, and not a *Middleſex* ſheriff; and he concluded, "*et hoc* "*paratus eſt verificare prout. cur. &c. et petit inde judicium per* "*quod arraiam. caſſetur.*"

IT WAS INSISTED ON, the inquiſition was in the nature of an information, declaration, or indictment; and took notice, that the houſe of priſon was in *London*, and that ſuppoſing the office be in *Middleſex*, yet that only made it like a common in one county appendant to a manor in another, in which caſe both counties ought to join; and if it be a good challenge to a jury that they are not indifferent, though of legal venue; *à fortiori* when they have

THE KING *againſt* THE WARDEN OF THE FLEET.

have no legal capacity at all; and 3. *Cro.* 646. was quoted, where cattle diſtrained in one county, and drove into another, and adjudged, that the jury to try that fact ſhould come from both counties: and though in truth *London* cannot join with another county, yet that ought to be ſuggeſted on THE ROLL; and the Court cannot otherwiſe take notice of it. Beſides, if the *venire* be awarded into both the counties, and a *London* jury came to the Bar, and did not inſiſt upon the privilege, the trial would be regular; but if they inſiſt upon their privilege, then perhaps the Court, for neceſſity, may award a *venire facias* to *Middleſex* only. And it is no reaſon to ſay, that becauſe we may have advantage of this in arreſt of judgment, we may not offer it * now; for though we waive what we may move in arreſt of judgment, yet we may aſſign it after for error in a writ of error.

* [338]

THE ATTORNEY-GENERAL *contra*. The cauſe of challenge to THE ARRAY is the want of indifference in the officer; and the reaſon why they may challenge THE PANEL is, becauſe that cauſe doth not appear on record; and therefore they have no other way to take advantage of it; and that too is the reaſon of challenge to the polls.

HOLT, *Chief Juſtice*. The matter of challenge ought not to be to the Court, as here you make it; for you ſay, We have awarded a writ to a wrong officer, for the array is rightly made according to the writ. If the panel were returned by a ſheriff being a party concerned, or being a member of a body politic concerned, it would be a good cauſe of challenge; but we do not take notice upon the awarding the *venire facias* of any ſuch thing, if we are not appriſed of it by ſuggeſtion of party; and the want of a proper *venue* was never yet a challenge to THE ARRAY. If he were akin to either party, or intereſted, or not qualified by law to make a return, or had made it at the requeſt of either party, or if the cauſe did concern the corporation of *London*, the *venire* ought to go to the coroner at firſt; but if you inſiſt upon it, you muſt demur for the king, and they join in demurrer; then all appearing to us on record, we may give judgment immediately, or take time to conſider.

And a demurrer was ordered to be drawn inſtantly, and a joinder in demurrer,

And the challenge over-ruled.

And HOLT, *Chief Juſtice*, ſaid, It had been proper for them to move to quaſh the *venire facias* before; but now the jury was at the Bar.

To

prove the eſcape here, a witneſs, who really had been a pri- and voluntarily ſuffered to eſcape, was produced (*a*).

A priſoner who had given bond to be a true priſoner admitted witneſs to prove that he was ſuffered voluntarily to eſcape.

whoſe being a witneſs it was objected, that he had given a or his being a true priſoner, which he had forfeited by eſcap- and beſides, he had been retaken. Now by his evidence he make this a bond of eaſe and favour, and the retaking a falſe onment; for if the defendant be convicted upon his evi- S. C. poſt. , and after debt be brought by him on the bond, the conviction e evidence to make it void, as taken for eaſe and favour: an action of falſe impriſonment for retaking, the conviction e likewiſe evidence: and it was compared to an information urious contract, even in the king's name, the party to the act ſhall not be a witneſs, if the debt be not paid (*b*). * So in * [339] nation of perjury, neither party whoſe title was ſupported or dated by the oath is a witneſs; for if there naturally do from his evidence, if believed, any conſequential advantage mſelf, he is no witneſs; and the caſes of *The King v. Tip-* (*c*) and *The King v. Hobby* (*d*) were quoted in the caſe of erjury.

was anſwered and reſolved by the Court,

RST, That if this were a bond for true impriſonment it would od; but if for eaſe and favour void, and an eſcape.

CONDLY, That a conviction here could be no evidence againſt Conviction of battery at the ſuit of the king cannot be given in evidence in treſpaſs on the ſame battery. arden upon debt on the bond, nor for the priſoner in falſe ſonment againſt the warden, becauſe it would not be between me parties; for conviction at the ſuit of the king for battery, annot be given in evidence in an action of treſpaſs for the ſame y, nor *vice verſa*: the like law of an uſurious contract.

HIRDLY, That no record of conviction or verdict can be No record of conviction or verdict can be given in evidence but ſuch as both parties might have produced. in evidence, but ſuch whereof the benefit may be mutual, where the defendant as well as the plaintiff might have made it, bring it into court, and give it in evidence, in caſe it did m. So if the record had been for the plaintiff's advantage, at they could not give it in evidence, the defendant ſhould ive it in evidence for that very reaſon: and this was reſolved ther trial at bar before this Term, between *Sherwin and Sir r Clarges* (*e*), where a verdict between the *Earls of Bath ountague*, upon the very ſame point and title now in queſ- *viz.* the legitimacy of *Chriſtopher, Duke of Albemarle*, was for evidence.

That the party eſcaping may be a to prove a voluntary eſcape, ſee Ford, 2. Salk. 690.
See Hard. 331. 1. Salk. 285. ns *Qui Tam v.* Bunn, 4. Burr. Walton *v.* Shelley, 1. Term Rep. Maſters *Qui Tam v.* Drayton, n Rep. 496. and 2. Hawk. P. C. 7th edit. ch. 82. page 385, 387.

(*c*) Hard. 331. and ſee Rex *v.* Eden, Sittings after Hilary Term, 34 *Geo.* 3. Eſpinaſſe's Caſes Niſi Prius, 97.

(*d*) 2. Keb. 845.

(*e*) Poſt. 343.

And

THE KING *againſt* THE WARDEN OF THE FLEET.

1. Vent. 51.

And by HOLT, *Chief Juſtice*, and THE COURT, Supp here had been no bond or re-taking in this caſe, he would b good witneſs, for he would be ſubject to be re-taken by his plain and then his ſwearing would not avail him; for ſince he is liabl be re-taken, no matter to him at whoſe ſuit it is. Then ther no objection againſt him but the bond; and ſurely the bond, bi a diſtinct and collateral matter to the eſcape, ſhall not hinder hi a witneſs; and it is not like the caſe of an uſurious contract, there the very bond is part of the crime, and no diſtinct act i it; and the party's coming to prove it is a diſcredit to the bon being part of the crime *(a)*. And as to the *caſe of Tipping*, t would have one whoſe title depended on the perjury be a witn when the conviction would make an end of the title; but all

Vide Hard. 331, 332.

is where the thing is part of the crime. Another caſe was in ac tion on an agreement * in writing in the common pleas, and ver

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for the plaintiff, and one hundred pounds damages in the comm pleas; and an information brought for the forgery: now the d fendant below was denied to be a witneſs to convict him. An ther reaſon was added from the nature of the thing, which being ſecret tranſaction, if any of the parties concerned be not, for th neceſſity of the thing, admitted for evidence, it will be impoſſible to detect the practice; as in caſes upon the ſtatute of HUE AND CRY the party robbed ſhall be a witneſs to charge the hundred. And the caſe of *Cook v. Watts (b)*, in the exchequer, where one, who had been prejudiced by the will, was admitted evidence to prove it forged. And the caſe of *The King v. Paris*, ſaid to be well reported in 1. *Sid.* 431. (c), A *feme covert* was received as a witneſs to convict one upon an information for a practice in draw ing her in, when ſole, to give a warrant of attorney for confeſſing a judgment upon an unlawful conſideration, whereby execution was ſued againſt the huſband; and HOLT, *Chief Juſtice*, ſaid, that though a *feme covert* could not by law be a witneſs for or againſt her huſband (d), yet in *Lord Audley's Caſe* (e), it being a rape upon her perſon, ſhe was received to give evidence againſt him.

So 1. Ven 243. Brown's Caſe. Poſtea, Paſch. 13. *Will.* 3. Pocock *v.* Thernicroft.

And THE COURT concurred with him, becauſe it was the beſt the thing could bear; and a verdict here could not be given in evidence againſt the bond.

But HOLT, *Chief Juſtice*, denied what was urged, that at com mon law the party whoſe deed was forged, or to whoſe prejudice the perjury was, could be a witneſs (f), and that the ſtatute had made any alteration.

(a) See the caſes cited above, note (b).

(b)

(c) Reported alſo 2. Keb. 572. 2. Vent. 49.

(d) See Co. Lit. 6 112 187. Hill *v.* Hall, 2. Stra. 1052. Field *v.* Curtis, Cowp. 829. Rex *v.* Clviger, 1. Term Rep. 263. and 4. Hawk. P. C. 7th edit. ch. 46. page 432.

(e) Hutton, 115. 2. Hale, 278.

(f) See, 4. Hawk. P. C. 7th edit. ch. 48. page 442.

ANOTHER

ıOTHER EXCEPTION to the ſame perſon's evidence was, he had been convicted of *common barretry*; and a record of his ction was produced, and that he had been fined one hundred ls.

A perſon convicted of *barretry* is an incompetent witneſs; but either a ſtatute or a charter pardon may reſtore him to his competency. Ante, 72.

ɔLT, *Chief Juſtice*, ſaid, If he had had the handling of him d not eſcaped THE PILLORY *(a)*; and that he remembered EANT MAYNARD uſed to ſay, it were better for the country rid of one barretor than of twenty highwaymen.

t in anſwer to the exception was read the late ſtatute of 7. *Will. & Mary*, which pardoned all the king could par-

ıd THE COURT held, that a pardon made him a legal witneſs, ıat even the king's pardon by charter would make him a legal ſs *(b)*, though ſuch a one as they could not encourage a jury ieve. And this diverſity was taken by them, *viz.* that if the lity be by act of parliament, and part of the judgment, that the cannot pardon it; but if the diſability be only conſequential, king may pardon it.

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t the defendant's Counſel not being ſatisfied with the reſolu- f the Court upon the firſt exception, prayed to have *a bill of tions.*

hereupon HOLT, *Chief Juſtice*, directed them to draw up exceptions; for the ſtatute ſays, "*ſcribantur exceptiones.*"

ID IT WAS AGREED, that the conſent of the party at whoſe he commitment was to the eſcape is good evidence for the dant.

Conſent to an eſcape is good evidence for the gaoler. Ante, p. 323.

ıd HOLT, *Chief Juſtice*, ſaid, If there be an executor in truſt, *eſtuy que truſt* agree to the enlargement of the priſoner, that is nce of the conſent of the executor, but not concluſive evi-

ıOTHER QUESTION was, Whether one who had been attor- ɔr the defendant ſhould be compelled to be a witneſs?

Atterney cannot be a witneſs in a cauſe in which he had been concerned.

ıRNELL ſaid, this being a criminal matter he ſhould; but ı in a civil matter.

t PRATT ſaid, that if he be ſworn we muſt aſk him his whole ledge, and perhaps he cannot diſcover that without charging lf; for if one's declaration generally may be made uſe of ſt him, *à fortiori* what he ſays upon oath ſhall; and this ıd to weigh with the Court.

But it is now decided, that it is nature of the puniſhment, but my of the crime, which deſtroys ıpetency of the convict, Pendock ckender, 2. Wilſ. 18.; and ſee ork. P. C. 7th edit. page 437. 2.

ice the caſe of Thomas Riley, ı Crown Law, 360. where, on the authority of Cuddington v. Wilkins, Hob. 67. 82. it is decided, that a convict on the ſtatute 31. *Geo.* 2. c. 10. for taking a falſe oath, &c. who is pardoned before judgment, is a competent witneſs againſt the perſon who ſuborned him to take ſuch oath; for by the allowance of the pardon he is reſtored to his former competency and credit.

But

THE KING *againſt* THE WARDEN OF THE FLEET.

But HOLT, *Chief Juſtice*, ſaid, he was of opinion againſt his Brothers ſome years before, in the caſe of one *Holford*, that anything an attorney knew, otherwiſe than *quatenus* an attorney, he ought to declare: but his Brothers held, that an attorney ought not upon any account to be received to reveal his client's ſecrets *(a)*.

And HOLT, *Chief Juſtice*, ſaid, If a client bring a forged deed to Counſel, the Counſel ought to proſecute him; and that he had known ſuch a thing done.

A perſon may be burnt in the hand twice.

HOLT, *Chief Juſtice*, upon occaſion of a witneſs that was burned in the hand ſaid, that one might be burned in the hand twice; as ſuppoſe the record of the firſt conviction be miſlaid, and ſo not produced *(b)*.

King's priſon.

NOTE, *Per* HOLT, *Chief Juſtice*, The king may have a priſon in another man's houſe.

Burning in the hand does not impeach his credit, unleſs it be for a crime that affects it. Ante, p. 72.

And in reſpect to a perſon who had been burnt in the hand, if it were for *manſlaughter*, and afterwards pardoned, it were no objection to his credit; for it was an accident which did not denote an ill habit of mind; but *ſecus* if it were for *ſtealing*, for that would be a great objection to his credit, even after pardon *(c)*: but the record of conviction ought to be produced, which here they had not *(d)*.

The houſe of the warden of the *Fleet* priſon is appendant to his office.

THE COUNSEL *for the defendant* at laſt inſiſted on this, that the houſe of THE FLEET was not appendant to the office, as the houſe of the Rolls is to the office of the Maſter of the Rolls: firſt, becauſe they paſs by two diſtinct grants; ſecondly, * that, if ever it was appendant, it was made diſappendant by letters patent in *King Charles the Second*'s time, whereby *Caroon Houſe*, in *Surry*, was given to the warden, and licence to ſell the *Fleet Houſe*.

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But it was anſwered and reſolved, FIRST, That there was the conſtant reputation of its having been appendant once, and that reputation continues ſtill. SECONDLY, That the granting a new houſe to the warden might indeed make that houſe appendant to the office, but not diſannex any; and, LASTLY, That the licence to ſell the houſe did work nothing till execution, which they had not ſhewed.

And both iſſues were found againſt the defendant.

(*a*) Neither Counſel nor attornies are permitted to reveal the ſecrets of their clients; but this is confined to thoſe facts only which have been communicated to them in the courſe of buſineſs. Bull. N. P. 284. 11. St. Tr. 243. Doe *v.* Andrews, Cowp. 845. Rex *v.* Watkinſon, 2. Stra. 1122. Rex *v.* Dixon, 3. Burr. 1687. Cobden *v.* Kendrick, 4. Term Rep. 431. Wilſon *v.* Raſtall, 4. Term Rep. 753.—See alſo 4. Hawk. P. C. ch. 46. ſ. 84. to 93.

(*b*) NOTE, This was Captain Coſſack's Caſe. See Bendloe's Rep. 172.

(*c*) See Ld. Ray. 370. 380. Stile 388. 5. Mod. 15. Hob. 81. and 4. Hawk. P. C. 7th edit. ch. 46. ſ. 108.

(*d*)

Anonymous.

Anonymous (*a*). Caſe 585.

is indicted for a nuſance for keeping ſeveral barrels of wder in a houſe in *Brentford Town*, ſometimes two times a week, till he could conveniently ſend them to

Indictment for a nuſance in keeping gunpowder muſt ſhew probable danger.

Chief Juſtice, reſolved,

That to ſupport this indictment there muſt be apparent miſchief already done.

LY, Though it had been done for fifty or ſixty years; a nuſance, time will not make it lawful.

Time will not legalize a nuſance.

.Y, If at the time of ſetting up this houſe in which the was kept, there had been no houſes near enough to be by it, but ſome were built ſince, it would be at the peril ler.

A pre-exiſting nuſance not indictable. Cro. Eliz. 118. Salk. 459. 3. Bl. Com. 217.

ILY, Though gunpowder be a neceſſary thing, and for the kingdom, yet if it be kept in ſuch a place (*b*) gerous to the inhabitants or paſſengers, it will be a nu-

Gunpowder not to be kept in inhabited places.

ſe was at *Niſi Prius*, before *Juſtice*.

(*b*) See the ſtatutes 11. *Geo.* 3. c. 35. and 12. *Geo.* 3. c. 61.

Anonymous. Caſe 586.

deviſed a legacy out of his land, and died, leaving ſuffi- aſſets for the payment of all his debts and legacies.

A legacy to be paid out of land is a charge on *the real*, and not on *the perſonal* eſtate of the teſtator. Ante, 276. 1. Fonth. Eq. 414.

Chief Juſtice. That legacy ought to be paid out of the is a charge on the land, and not on goods.

COWPER, *King's Counſel*, ſaid, that in chancery, if it be d that the legacy ſhould be paid out of land, and not out there be ſufficient aſſets, they will charge them in eaſe ice.

ch HOLT, *Chief Juſtice*, anſwered, If chancery be ith wills, they ought to go according to law.

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ſe a probate * of the will was given in evidence, it being ars ſtanding, and the witneſſes being three, and dead: of was made of the death of two of them, and circum- f of that of the third.

Probate of a will admitted in evidence to prove a legacy. Eſpinaſſe Dig. 761. Bull. N. P. 245.

Caſe 587.

Anonymous (*a*).

Before bill of review granted the decree to be executed.

IT was agreed BY THE COURT and THE BAR, that the courſe of the Court is, before any *bill of review* is granted the former decree ought to be executed, if the cauſe of the bill of review be not ſuch as extinguiſhes the whole right and foundation of the decree, as a releaſe; and that it is a good plea in bar of a bill of review, that the former decree is not executed. And it was ſaid, that though bills of review be in nature of a writ of error, yet it is not favoured in equity; for upon writ of error (and that only in ſome particular caſes) one need only give bail to pay principal and coſts; but in bill of review the decree ought to be actually complied with; and beſides, there ought to be a ſecurity for coſts: but a caſe of *Palmer v. Denby* (*b*) was cited, where in the caſe of an executor it was granted, without execution of decree.

Privilege.

NOTE, It was alſo agreed, that if a parliament-man ſue one at *law*, he may bring him, without breach of privilege, into *equity*, to diſcover matter neceſſary for his defence at law. *Quære.*

(*a*) This caſe was in the court of chancery.

(*b*) 1 Eq. Abr. 219. 251. Pre. Chan. 137. 2. Eq. Abr. 383. 384.

Caſe 588.

Sir Walter Clarges *againſt* Sherwin.

What is not evidence for one not to be evidence for the other.

Ante, 339.

AT A TRIAL AT BAR, in ejectment, of lands in *Yorkſhire*, part of the *Duke of Albemarle*'s eſtate, wherein the legitimacy of *Duke Chriſtopher* was the only queſtion, it was ruled by THE COURT, that a former verdict between other parties, concerning other lands depending upon the ſame queſtion and title, could not be read in evidence; for if it were in affirmance of the plaintiff's title, they could not read it, as being between other parties; and what would not be evidence for one ſhall not be for the other.

Poſtea, 346.

But notwithſtanding the verdict was read, to let them in to give evidence that a witneſs produced by the plaintiff had ſworn now directly contrary to what he had ſworn at the trial.

ICHAELMAS TERM,

The Eleventh of William the Third,

AT

Niſi Prius,

BEFORE

Sir John Holt, *Knt. Chief Juſtice.*

Caſe 589.

* Anonymous.

The character of *a pawnbroker* may be injured by ſlandering his ſolvency in trade.

N ACTION OF SLANDER, in which the plaintiff ſet out, that he was A PAWNBROKER by trade, and that the defendant ſaid theſe words of him, "Thou art a broken fellow;" id and proved loſs of cuſtomers, *viz.* that ſome who were g to pawn goods with him forbore coming, and others took theirs by occaſion of the words.

Vide Keyl. Cr. Caſes 50. ſeems *cont.*

LT, *Chief Juſtice.* The trade of *a broker* is an honeſt law- ade, though it lies under ſuſpicions; for it is lawful to buy old and ſell them again, and ſo to lend out money upon pledge; broker ought to be very cautious in buying, for fear of buying goods; yet if he ſhould buy ſtolen goods, not knowing them ſuch, it is no crime (*a*).

A ſearch warrant may iſſue on ſuſpicion of felony.

D upon points ariſing upon this caſe HE ſaid, that one might warrant to ſearch a ſuſpicious houſe, *upon a felony commit-*); but it is at his peril to execute it in due time, and at ſuſ- houſes only (*c*); and though a conſtable may, by virtue of arrant, ſearch the houſe, and all other things that his warrant iſes him to do, yet if he go beyond his warrant, by which any- s damaged, he is anſwerable for it (*d*).

But by 1. *Jac.* 1. c. 21. "The f any goods wrongfully taken to awnbroker in *London*, or within iles thereof, ſhall not alter the rty." 2. Bl. Com. 448, 449. . Inſt. 46. 52.—See alſo Samuel *v.* Payne, Dougl. 345. Ledwick *v.* Catchpole, Cald. 291.

(*c*) Hale P. C. 46. 4. Hawk. P. C. ch. 13. ſ. 16, &c.

(*d*) See the caſe of General Warrants, 10. St. Tr. 426. 4. Hawk. P. C. ch. 13. ſ. 10.

Caſe 590.

Anonymous.

If a captain of a ſhip refuſe to deliver a ſailor his clothes, &c. it is a converſion.

THE CASE was: A captain contracted with ſeamen to go on a voyage, and after he had got them on board he would not pay them according to agreement; upon which they demanded their goods, which he refuſed, if they did not ſtay till he had ſearched for them, which he refuſed to do then; and this was held good evidence of a converſion.

Vide diverſity, 1. Sid. 264. 1. Lev. 282. 1. Mod. 31.

HOLT, *Chief Juſtice.* In trover, the plaintiff ought to prove property of goods in him (*a*). And at leaſt a demand and refuſal; and if there be ſeveral parcels, the orderly way to give evidence is to make *an inventory* of them, and prove the property of goods mentioned in it, and demand and refuſal of them.

(*a*) See Colſton *v.* Woolſton, Bull. N. P. 35. Power *v.* Wells, Cowp. 819. and the caſe of Gordon *v.* Harpur, argued in the court of king's bench in Eaſter and Trinity Terms 1796.

Caſe 591.

Anonymous.

The property of goods is in the perſon who, as purchaſer, pays the money for them.

HOLT, *Chief Juſtice.* A ſon employed his father to buy a frame for him; the father agreed for it in his own name, and paid part of the money down, and gave a note for the reſt. By the payment of the money, and giving the note, the property of the frame was immediately veſted in the father; and though the bill of ſale, which was not made till a month after, was made to the ſon, the property, which was * already altered and veſted in the father, could not be thereby deveſted and lodged in the ſon; but if the bill of ſale had been made to the ſon at the time of ſale, it would have veſted the property in the ſon: and *an earneſt* does not alter the property, but only binds the bargain; and property remains in the vendor till payment of the money or delivery of the goods (*a*).

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(*a*) See the ſtatute 29. *Car.* 2 c. 3. Langford *v.* The Adminiſtratrix of Tiler, 1. Salk. 113. S. C. 6 Mod. 162. 329. 1. Com. Dig. 3d edit. 413. 2 B. Com. 447, 448.

Caſe 592.

Anonymous.

The firſt indorſer may bring an action on a bill of exchange, by ſtriking out the other indorſers names.

AN INDEBITATUS ASSUMPSIT upon a bill of exchange by *Domingo Franca.* It appeared upon the declaration, that there were ſeveral indorſements, and the action was brought by the firſt indorſor, who ſtruck off the ſeveral indorſements, and brought action for non-payment. The bill ſpecified, "value received of the plaintiff."

HOLT, *Chief Juſtice.* If the action had been upon the cuſtom in this caſe the way had been for the plaintiff to get the laſt indorſee to indorſe it to him, for him to bring an action as indorſee: but this action, he ſaid, well lay, for the bill was given as a ſecurity for money, and without doubt it was a debt.

And

And here the plaintiff, to ſhew A PROTEST, produced an inſtrument, atteſted by a notary-public.

A proteſt needs no other proof but the atteſtation of a notary public. Kyd on Bills, 136.

And though it was inſiſted on, that he ſhould prove this inſtrument, or at leaſt give ſome account how he came by it,

HOLT, *Chief Juſtice*, ruled it not to be neceſſary, for that, he ſaid, would deſtroy commerce, and public tranſactions of this nature.

AND HE SAID, a bill of exchange might be accepted by parol, though the uſual way be to do it by writing (*a*).

A parol acceptance is good.

AND THAT, if a bill be drawn upon two, and one of them accepts it, it is an acceptance of both (*b*).

Acceptance by one partner binds the reſt.

THEN IT WAS URGED, that the declaration ſhews a proteſt for want of payment, when it was in truth for want of acceptance, as appeared by the proteſt.

Proteſt for *non-payment* includes proteſt for *non-acceptance*.

YET IT WAS RULED well, becauſe this was not upon the cuſtom, but a plain debt; and one might bring debt or *indebitatus aſſumpſit* upon a bill of exchange, becauſe it is in the nature of a ſecurity.

Kyd on Bills, 136. 193.

(*a*) Lumley *v.* Palmer, 2. Stra. 1000. Kyd on Bills. 70.—See alſo Powell *v.* Monnier, 1 Atk. 612.
(*b*) 1. Salk. 126. Gilb L. E. 117. 1. Ld. Ray. 175. Kyd on Bills, 31.—But ſee Kilgour *v.* Finlyſon, 1. H. Bl. Rep. 155.

Anonymous. Caſe 593.

THE ORIGINAL DRAWER was offered as an evidence in an action upon a bill of exchange, to prove that he did not draw the bill.

Drawer of a bill of exchange no witneſs to prove he did not draw it. Ante,]

But was denied, becauſe at laſt the burden muſt fall upon him; if the party gave him *a releaſe* in court, and that was ſufficient.

1. Ld. Ray. 444. Stra. 946. 3 Burr. 1354. 1. Black. Rep. 390.

* [346]

* ——— *againſt* Harriſon. Caſe 594.

A SERVANT had power to draw bills of exchange in his maſter's name, and afterwards is turned out of the ſervice.

A maſter who has authoriſed a ſervant to act is bound by acts done ſubſequent to his diſcharge, unleſs notice be given. 3. Bac. Abr. 560.

HOLT, *Chief Juſtice*. If he draw a bill in ſo little time after that the world cannot take notice of his being out of ſervice, or if there a long time out of his ſervice, but that kept ſo ſecret that world cannot take notice of it, the bill in thoſe caſes ſhall bind maſter.

Case 595.

Anonymous.

Witness.

A. AND *B.* two brothers; the goods of *B.* in his house were taken in execution; *A.* supposing them to be his goods, brings trover; and *B.* and his wife were denied to be witnesses to prove them the goods of *A.* though it were to divest the property out of themselves, because it savoured of fraud. *Quære.*

Case 596.

Anonymous.

Executor taking a bond from a debtor makes it assets.

1. Salk 79.

IN DEBT by husband and wife against an executor, who pleaded *plene administravit.* Upon issue it was proved, that the executor had discharged a debtor of the intestate out of *Lancgate*, taking a bond from him for the debt; and it appeared that he was so extremely poor that he was downright starving; yet the debt was judged *assets* in the executor's hands.

Assets presumed, if inventory not given in.

Besides, the executor had not an inventory; wherefore it was said they ought to intend assets.

And here HOLT, *Chief Justice*, ruled,

Wife continues suit commenced by her and her husband, when recovered shall not be assets.

1. Chan. Ca. 189. *cont.* 1. Chan. Ca. 182.

FIRST, That if a husband and wife jointly sue for a debt due to the wife before marriage, and the husband dies, and the wife continues the suit, the money, when recovered, shall not be assets to the executor of the husband.

Husband may sue alone for his wife's portion.

Prec. in Chan. 63. *Ca.*

And that husband alone might bring debt for a portion promised to him with the wife; and though land had been settled by the husband upon the wife in consideration of her fortune, of which this debt was part, yet he having not recovered it during coverture, the wife should recover it to her own use.

An *execution* cannot be given in evidence without shewing the *judgment.*

Ante. 343. *pari ratione.*

And though it was pretended that there was a recovery in the husband's time, and that they would prove by the sheriff who had a writ of execution, yet they having not the judgment on which the execution was, it was ruled they could not give that in evidence.

* [347]

Case 597.

* Normand *against* Mills.

A constable is not justified by a warrant executed after the justice who granted it is out of the commission.

1. Ld. Ray. 740.

FALSE IMPRISONMENT against a constable for executing a warrant of *Sir James Butler* after he was out of the commission of the peace.

HOLT, *Chief Justice.* The constable at his peril is to take notice that his warrant be by one in commission; but all the favour we can do him is, since it was a warrant executed a day or two after *Sir James* was out of the commission, that if he has behaved himself honestly and civilly, to be mild to him: and he said, the constable ought to shew the justice of peace's commission, though heretofore it were held common reputation would be enough; and here the constable, coming out of his own parish to execute the warrant, betrays his officiousness.

EASTER

EASTER TERM,

The Twelfth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Henry Gould, *Knt.* } *Juſtices.*
Sir Lyttleton Powys, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Earl of Peterborough *againſt* Sadler.

Caſe 598.

A third trial granted on account of the great difference in the damages found by the former verdicts.

N A CASE between the *Earl of Peterborough* and *Sadler* his farmer, a trial being concerning the value of improvement made by *Sadler*, a jury of farmers having given two hundred nds damages, which was thought exceſſive, and therefore a new l granted, and a jury of gentlemen ordered, who only gave forty nds: whereupon a new trial now was moved for, for *Sadler*, auſe of ſmallneſs of damages:

OLT, *Chief Juſtice*, ſaid, that one * muſt not always conclude auſe the Court grants a new trial, that they are ſatisfied that the verdict was bad, but it is often becauſe the thing may require a xamination.

* [348]

nd a new trial was granted.

Cecil *againſt* Others of the Town of Nottingham.

Caſe 599.

Whether an attachment may be ſerved on *Sunday*.

1. Hawk. 19.

HE QUESTION was, Whether ſerving *an attachment* for contempt on *Sunday* were within the ſtatute 29. *Car.* 2. c. 7 ſ. 6. Words of which are, "That no perſon or perſons upon the "Lord's

Sir Cecil *againſt* Others of the Town of Nottingham.

"Lord's Day ſhall ſerve or execute any writ, proceſs, warrant, "order, judgment, or decree, except in caſes of treaſon, felony, or "breach of the peace."

HOLT, *Chief Juſtice.* Suppoſe it were a warrant to take for forgery, perjury, &c. ſhall it not be ſerved on *Sunday?* And ſhall not any proceſs at the king's ſuit be ſerved on *Sunday?* Surely the Lord's Day ought not to be a ſanctuary for malefactors; and this here partakes of the nature of proceſs upon an indictment.

But CURIA *adviſare vult (a).*

Interrogatories on an attachment.

HOLT, *Chief Juſtice.* Upon an attachment one is only to anſwer interrogatories; and if he can ſwear off the contempt, he is diſcharged.

Ignorance of law.

HOLT, *Chief Juſtice.* Ignorance of the law cannot be pleaded in juſtification of an act againſt law, but may be offered in mitigation.

(a) The arreſt of a petitioner to the court of chancery, under a warrant of the court, for a contempt in diſobeying an order, has been held well executed on a *Sunday*, *Ex parte* Whitchurch, 1. Atk. 55; but a perſon convicted on a penal ſtatute cannot be apprehended on a *Sunday* for non payment of the forfeiture, Rex v. Myers, 1. Term Rep. 265. in which it is ſaid, that *Cecil's Caſe*, as above reported, might have been good law at the time it paſſed, for then the Court looked only to the contempt; but that it has been ſettled of late years, that an attachment for non-performance of an award is only in the nature of a civil execution, 1. Term Rep. 266.—See alſo Rex v. Stokes, Cowp. 136.

Caſe 600.

Anonymous.

The attachment which entitles the party to damages is on the *pluries*; that which puniſhes the contempt is on the *alias*. Ante, 164.

HAWLES, *Soliciter General*, moved for *an attachment* upon the *alias mandamus*.

HOLT, *Chief Juſtice*, ſaid, It hath been ſometimes granted in the like caſe, but not frequently. And there were two ſorts of attachments upon a mandatory writ; the one intitles the party to his action for damages, and that muſt be upon the *pluries* (a); and the other puniſhes the contempt, which may be on the *alias*. So is the attachment upon a prohibition, which is the caſe in *Croke*; and here they took a *pluries*, and no attachment.

(a) 1. Cro. 559.

Caſe 601.

The King *againſt* Bell.

Recognizance diſcharged on indictment being found.

BELL was bound by recognizance to appear here for printing a ſeditious libel concerning the *Scots* colony at *Darien*; and it appearing an indictment had been found againſt him at THE OLD BAILEY, which he had traverſed, and was to anſwer there, his attendance was diſcharged here.

Anonymous.

Anonymous. Caſe 602.

GH THE PLAINTIFF, after judgment, does own ſatiſ- Plaintiff not to
n by parol, yet we never do compel him to do it by deed, confeſs ſatisfac-
'endant does not releaſe errors; for if the judgment were tion unleſs the
everſed, the plaintiff would be concluded. defendant re-
leaſes errors.

Stout *againſt* Marſon and Cowper. Caſe 603.

: DAY on which an appeal was returnable it was moved, On writ return-
ıe appellant ſhould be demanded. ed, the appellant
may be demand-
There is no writ returned, ſo no appeal pending; ed, and on his
:riff has all this day, ſitting the Court, to make a return. not coming the
'AS AGREED, that if the writ were returned, they might appellee will be
have the appellant demanded; and if he did not come, diſcharged.
l be diſcharged.

ıotion for the appellant, that the ſheriff ſhould return his
enied, there being no affidavit that it was delivered to the

Sprag *againſt* Richardſon. Caſe 604.

: OF COURT was for the ſheriff to ſhew cauſe, upon his Sheriff ordered
ıal attendance, why he ſhould not pay money levied on to pay money
levied on a *fieri*
facias.
n affidavit of ſervice, NORTHEY moved for a new rule
:o pay the money, let the Court deal with him as they

ıffidavit being defective, they were ordered to amend it.

Butler *againſt* Rews. Caſe 605.

N for a falſe return to a *mandamus* was brought by two Two cannot
hwardens *(a)*; and moved in arreſt of judgment that it join in an action
ɔe, becauſe the fees of the one were not the fees of the for a falſe return
to *mandamus*.
ſeveral. Ante, 332.

adviſare vult.

(*a*) See Rex *v.* Town of Andover, ante, 332.

The King *againſt* Hays. Caſe 606.

)ER OF SESSIONS was made for the diſcharging an The ſeſſions
ıtice from his maſter upon the ſtatute of 5. *Eliz.* c. 4. may make an
original order for
ceptions taken to it. the diſcharge of
an apprentice.

FIRST,

THE KING *againſt* HAYS.

FIRST, That the firſt proceeding was at the quarter ſeſſio whereas it ought to have begun by complaint to two juſtices; for this the caſe of *Hawkſworth v. Hillary* (*a*) was cited; to wh was oppoſed 1. *Vent.* 174.

SECOND EXCEPTION, That it appeared the maſter was not ſent (*b*).

HOLT, *Chief Juſtice*, was then ſtrongly againſt the order t
* [350] * the firſt exception, for that they ought to have followed method ſet them by the ſtatute; for the Legiſlature thought co nient that endeavours of juſtices of peace ſhould be firſt uſed; if the party of whom complaint was had not complied with the tice's propoſal, then that he ſhould give a bond to appear at ſeſſ and that is as it were by appeal: but if the party had promiſe obey the juſtice of peace's orders, but afterwards would not ſta them, the only way was to complain *de novo*, *&c.* and the juſti attach him, and bind him to the ſeſſions.

BUT NOTE, In *Trinity Term* 1701, in the caſes of *The Kin Johnſon* (*c*) and *The King v. Fenwick* (*d*), it was unanimouſly ſolved, the order made at ſeſſions at the firſt ſtep was good HOLT, *Chief Juſtice*, ſaid, he was brought to that reſolution n from the neceſſity of the thing, the practice being all ſo, than reaſon he ſaw for it (*e*).

(*a*) 1. Saund. 314. S. C 1. Mod. 2.
(*b*) See Ditton's Caſe, 2. Salk. 491. that the ſeſſions may diſcharge an apprentice although the maſter do not appear. —But ſee Reg *v.* Rutter, 1. Conſt. P. L. 513. Rex *v.* Gill, 1. Stra. 143.
(*c*) Salk. 68. Poſt. 553.
(*d*) See poſt. 553. *notis.*
(*e*) See Rex *v.* Dillon, poſt. 498 *v.* Davis, 2. Stra. 704. Rex *v.* H man, Ann Rep. 101. S C Stra and Mr. Conſt's P. L. 1 vol. 513.

Caſe 607.

Creamer *againſt* Wickett.

To an act on in the court of king's bench, if the defendant plead another action pending for the ſame cauſe in the ſame court, the plaintiff may reply "*nul tiel record*," and if the entry be "*quia dicit. "regis &c. ſe "advifare vult "ſuper inſpectione "recordi et dies "datus eſt, &c.*" a demurrer to it is bad; but the plea. — S. C. Carth. 517. S. C. 1. Ld. Ray. 550. 2. Wilſ. 113. 367.

IN ASSAULT AND BATTERY, the defendant pleaded in abate another action for the ſame cauſe pending in this court which "*nul tiel record*" was replied, and "*habetur tale rec* rejoined; and the plaintiff ſigned his judgment for want plea.

And a rule granted to ſhew cauſe why *a writ of enquiry* ſh not be executed.

NORTHEY ſhewed for cauſe, that a record of this court b pleaded, and "*nul tiel record*" replied, there was a full iſſue joi and therefore by the courſe of the Court the plaintiff could not his judgment till he had paid the defendant's attorney for ent his plea. *Vide Dy.* 228. *Co. Ent.* 138.

THE WHOLE QUESTION was, Whether, after a record o ſame court pleaded, it were proper to plead *nul tiel record.* a plaintiff cannot ſign final judgment by *nil dicit*, for want of the defendant's pay

n iſſue upon it, or that the defendant might demur to the repli-ion ?

CRAMER *againſt* WICKETT.

NORTHEY urged, that if a record of the ſame court be pleaded, plaintiff may immediately crave *oyer* of it; and if the defendant not grant it, or produce the record, there is an end of the plea.

Quod fuit conceſſum PER CUR. *Vide* 5. *Hen.* 7. 24.

But if it be a record of another court, the way is to reply *nul tiel rd.* and then day is given to bring it in: but that it was a doubt antient Books, whether *nul tiel record.* might be pleaded to a ord of the ſame court; and that it might, he quoted the caſe of *k v. Pierce* (*a*), where the queſtion was upon * ſuch a plea aded, and day given to bring in the record, and it not produced, ether that were a failure. *Vide* 256. *H.* 6. *Rot.* 424. 1. *Inſt.* [351]

And *per* HOLT, *Chief Juſtice*, It has obtained, that when a record leaded in the ſame court, they may reply *nul tiel record.*; but proper way is to crave *oyer*, and then a day is given. And he l, a record might be pleaded by way of inducement, which is not verſable; and to it *nul tiel record.* is no plea: ſo if record of an erior court be pleaded it is not traverſable, becauſe not a good a.

Vide 1. Saund. 97, 98, 99. Ante, 215. that he might.

And the caſe being again moved, it was held PER CUR. t the defendant ought not to rejoin and ſay, *habetur tale record um*, the entry upon pleading a record of this court is, "*quia Cur. domini reg. adviſar. vult, &c. ideo dies datus eſt, &c.*" to produce record; and if upon ſearch the record be found, then the ſame ſhewn in court, and thereupon judgment; or if the record be found, then there is an entry of ſearch, and no record found, thereupon judgment of *reſpondeas ouſter*. So there are two ys of replying when a record of the ſame court is pleaded, either eply *nul tiel record.* as is done here, or to crave *oyer* of it; and y relied on the caſe in *Dy.* 228. And to what purpoſe ſhould join iſſue upon the being of a record of this Court when we e them all before us, and may preſently know the matter? and difference is between a record of this court and of another rt.

Difference where it is a record of the ſame court and where of another court.

Ante, 214, 215. 267.

And judgment final being entered was ſet aſide, becauſe failure record is not peremptory; and it being upon a doubt of practice l not conclude.

(*a*) Mich. Term, 8. *Will.* 3.

——— *againſt* Wats. Caſe 608.

DEBT AGAINST BAIL the queſtion was, Whether they ſhould be admitted to ſurrender the principal, as they might upon a r *facias* upon two *nihils* returned? and it ſeemed reaſonable r ſhould, and made a rule of court.

In debt againſt bail, principal may be ſurrendered.

Anonymous. Tidd's Pract. 46. 53.

Caſe 609.

Anonymous.

Scire facias on a wrong judgment ſet aſide on motion.

SCIRE FACIAS recited a judgment in the time of the king, which in truth was in the time of the king and queen, and ſo no judgment to warrant it; and judgment upon return of *nihil*.

CURIA. In ſtrictneſs we ought to put them to *audita querela*; but we generally relieve them upon motion, and the judgment on the *ſcire facias* was ſet aſide; and ordered, that the money levied by a *fieri facias* thereupon ſhould be refunded.

* [352]

Caſe 610.

* Horn *againſt* Luines.

If, to an avowry in replevin for rent, the plaintiff plead, "that "the defendant "took the cattle "of his own "wrong, *abſque* "*hoc*, that any "thing was in "arrear," ſuch plea muſt conclude *to the country*, and not *to the court*.

S. C. 1. Ld Ray. 699.
S. C. 2. Salk. 585.
S. C. 3 Salk. 344. 356.
S. C. Fort. 233.

IN REPLEVIN, the defendant intitles *J. S.* to a rent-charge of one hundred pounds a-year in the place WHERE: and makes conuſance as his ſervant for a year's rent arrear at ſuch a time.

The plaintiff replies, that as to fifty pounds, part of the ſaid rent ſuppoſed to be due at ſuch a time, *de injuriâ ſuâ, &c.* ABSQUE HOC, that there was *riens arriere, et hoc parat. eſt verificare*; and as to the other fifty pounds, a readineſs for payment of it at the day of payment; and that he always was, and ſtill is, ready to pay it, *et profert in cur. et petit judicium de damnis.*

The plaintiff by his bailiff takes the money out of court, and traverſes his being always ready, &c. and demurs to the firſt plea ſpecially, becauſe that making a complete general iſſue, he ought to have concluded *to the country*, and not with *an averment*; for it was agreed, that if they could not plead it without an inducement he muſt have concluded with a traverſe; but this was no more than "*riens arriere*," and therefore pleadable as ſuch, and then he ought to conclude *to the country*; and that not concluding *to the country* where one ought was fatal, was quoted 2. *Saund.* 188.

SECOND EXCEPTION, That the other part of the plea was bad, becauſe he demands judgment *de damnis*; for if there be anything due to us, we have cauſe of diſtreſs, and then he can have no damages; for if I diſtrain for two things, and I have cauſe for the one and not for the other, if I juſtify for any one of them I ſhall have return for both. *Hob.* 133. But if I diſtrain two ſeveral diſtreſſes for two ſeveral cauſes, as ſuppoſe two horſes, one for treſpaſs and the other for rent, there juſtifying for one intitles me to a return for one only; and the plaintiff ſhall recover damages for the other.

ANOTHER POINT in this caſe was, Whether, after taking the money out of court, he could plead a demand, and refuſal after, or traverſe the tender, &c. for damages? and that he could not was quoted, *Cro. Jac.* 126. 21. *Edw.* 4. *pl.* 25. *pl.* 39. full in point 1. *Inſt.* 107. *a.*

Contr

precedents were urged, where, after money taken replied for damages, *Ashton*, "*Debt*," 278. *Mich.* *ac.* 1. *Rott* 1718. *Rast.* 159. *lib. pl.* 159. *esne*," 7.

Hoare *against* Lukes.

THER SIDE *it was answered*, that the plaintiff could ut as it was tendered; and that it was tendered in nages. * [353]

at amounts to the *general issue* may be pleaded with c, they insisted upon the case in 3. *Leon* 239. *Kel.*

M. When money upon a plea is taken out of ment is, "*eat inde quietus sine die*;" for when the gs in the money, the plaintiff, by taking it out, defendant's allegation. And they said, they knew amages are only accessary; and the plaintiff by his mself from judgment for the principal, that he shall for the accessary. But in ejectment, where the term ng the plea, it is otherwise. And as to one half- ereof he pleads a tender, if he had pleaded a tender n a good plea, according to *Hob.* 207. for he could erward without making a demand in case of rent

When money on a plea is taken out of Court, the judgment is *eat inde sine die.*

2. Cro. 126.

e the tender be well pleaded, the bringing the money perfluous in case of an avowry; but in debt upon ender *et adhuc parat.* is the plea, and there it is ng the money into court to save damages. But the manded here, for it is a replevin for goods; and the , Whether he had a right to distrain? for if he had to be damages against him, and no return; if he o have return of the distress.

Bringing money into court on tender of rent is superfluous in avowry, but in debt on bond is necessary to save damages.

ere was no tender pleaded, but only *paratus fuit* r be the grantee present or absent, there ought to be ed, and that he did not come to receive it. And if ad, as questionless it is, and you bring money into bailiff take it out, both your bringing it in, and out, is impertinent; and since your plea is bad, ter is not material; for here is a good avowry, and to it; for though he never did demand, yet if you er he may distrain without any demand at all; and ress tortious, you should have pleaded a tender; and gh money be brought into court by you, and taken e ought to award a return. Take advantage of the taken out as you can.

In tender of rent *obtulit* should be pleaded.

Vide 2 Cro. 14. Yelv. 38.

he traverse, that the distress was *de injuriâ suâ pro-* *prio*, that there was *aliquid aretro*, the * question be well pleaded? It is the same as *riens arriere*, *re* is the general issue in an avowry; for the lord there is so much rent behind, and the tenant pleads *riens* * [354]

HORN *againſt* LUINES.

riens arriere, et de hoc, &c. which is the proper way; and inſtead of this you come with a circumlocution of an inducement, and an *abſque hoc*; and this, though it be but form, yet it is legal form, and ſuch as the law will have obſerved.

Where the general iſſue is ſpecially pleaded, if colour be not given it is good cauſe for demurrer.

And where one pleads a *general iſſue* ſpecially, without *giving colour*, it is good cauſe of demurrer; and yet that is but form; for if he had pleaded the general iſſue, he might have given the ſpecial matter in evidence; but here your intent by this ſpecial plea was to have forced them to reply, by which you would inconvenience them; for if you had pleaded the general iſſue, there had been an end of pleading." *Huiſh's Caſe* (*a*). An *audita querela* upon a defeaſance of a recognizance; and it was for payment of money at ſuch a day; and pleaded, that he was ready at the place, and tendered it, &c.: the plaintiff pleads, that he was at the place ready to receive, ABSQUE HOC, that the other was there to tender; and held the plea was bad upon the reaſons *ſupra*. So *obtulit* is abſolutely neceſſary, and *paratus* not ſufficient. Secondly, the bringing the money into court does not abate the writ. Thirdly, In replevin there needs no *profert in cur.* becauſe you do not demand the thing itſelf. Fourthly, *Riens arriere* is the general iſſue, and therefore to be pleaded and concluded ſo; and though pleading it ſpecially be but form, yet for avoiding prolixity in pleading it is bad on demurrer.

Vide 1. Vent. 101.
2. Cro. 14.
Yel. 38.

And PER CURIAM, The plaintiff had judgment on both pleas.

HOLT, *Chief Juſtice*, ſaid, that it was not yet ſettled whether after return irreplevisible, if the party tender arrear to the bailiff, it be good to intitle him to action for detainer againſt principal; though it be ſo ſettled in caſe of tender to principal in *Carpenter's Caſe* (*b*). And he ſaid, that he was not ſatisfied with *Pilkenton's Caſe* (*c*) in that point; for if bailiff may not diſtrain, nor receive money tendered, why ſhall his receipt abate a writ?

Ante, 8. 152.

NOTE, In this caſe, upon the point of pleading of tender, this diverſity was taken by HOLT, *Chief Juſtice*, that tender at the day is no plea to a ſingle bill, but only in bar of damages; in which caſe you muſt plead it before imparlance, with a "*touts temps et uncore priſt et prefert, &c.*;" but tender at the time is a good plea to a penal bond in bar, becauſe it ſaves the forfeiture, and therefore may be after imparlance (*d*).

Note diverſity.

(*a*) 3. Cro. 764.

(*b*) 8. Co. 145. 2. Roll. Abr. 561.

(*c*) Cro. Liz. 813. 5. Co. 76. Co. Ent. 602.

(*d*) *Sid. rule* 1. Inſt. 207. a. 21. *Fdw.* 4. 25. pl. 30. This ſeems to hold only where the penal bond is for doing a collateral thing, and not where it is for payment of money. But *vide* the caſe in Dyer, 300. a. that in caſe of a bond for payment of money he may plead tender *et uncore priſt* after imparlance.—NOTE *the former edition.*

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Caſe 611.

The King *againſt* Hatcher.

Information for putting wax to writs not being ſealed.
S. C. 14. Viner, 411.

HATCHER, *a Clerk in Chancery*, was committed by my Lord Keeper for ſending writs into the country with ſoft yellow wax upon them, without being ſealed by the great ſeal, as if they had been actually ſealed; and this was ſaid to be a very high miſdemeanor

and next to counterfeiting the ſeal; and he was bound in one thouſand pounds, and two more in five hundred ach, for his appearance, in order to an information.

THE KING *againſt* HATCHER.

Pullen *againſt* Purbeck.

Caſe 612.

LEGIT was ſued about eight years before, and a return of *extent* thereupon filed then thus: "That the defendant oſſeſſed of chattels to ſuch a value, which he had taken in tion; that beſides, the defendant was ſeiſed of a certain cloſe *A.* of the yearly value of fifty pounds a-year; and of a cloſe *B.* of the value of five pounds a-year; and of a third cloſe value of fifty pounds a-year; and ſo found by the inquiſi- and had no more lands or tenements at the time of the ient, or at any time ſince; that he delivered to the plaintiff id cloſe of *A.* and *C.* to hold *tanquam liber. tenemen. &c.*"

iis being filed on record, the plaintiff never having entered e of it, ſues out this ſpecial *ſcire facias*, ſuggeſting all this To which the defendant demurred.

If, to an *elegit*, the ſheriff return that the defendant was ſeiſed of two farms, the one of forty pounds a-year, the other of ſixty pounds a-year, and that he had delivered to the plaintiff the ſaid farm of ſixty pounds a-year, the execution is *abſolutely void*, for the ſheriff cannot deliver more than a *moiety* of the defendant's lands (*a*); and therefore the plaintiff may, in ſuch caſe, ſue out a freſh writ of execution.

CASE was argued ſeveral times by CHEATHAM *for the t*, and NORTHEY *for the plaintiff*, this Term (*b*).

he plaintiff was quoted *Hob.* 47. that if execution be ſued, uted by *elegit* of lands not extendible by virtue of it, yet the n ſhall not be thereby merely void; but if the party has iedy, it muſt be by *audita querela*, 1. *Roll. Abr.* 104. ſaid, that though it might be ſaid that ſuch execution be ome Books, that is to be underſtood it may be avoided or ; and that ought to be before filing of the return; and he . *Hen.* 5. c. 5. and . and 1. & 13. *Eliz.* where that word ſo underſtood in an act of parliament; and relied on *Hale's* 1. *Sid.* 239. that ſuch *extent* of more than a moiety was idable, after return filed. 2. *Inſt.* 296. that *an extent* d cannot be ſet aſide, as it may before filing an examination, urt ſee occaſion. 1. *Edw.* 3 *pl.* 44. 49. *Bro. Extent*, 5. *xtent*, 2. 1. *Sid.* 356 1. *Roll. Rep.* 89. 3. *Cro.* 310. *elegit* was granted, upon ſurmiſe of more lands than were l; but if that had not been ſurmiſed upon return of the cond *elegit* would have been merely void. *Vide* 15. *Hen.* 7. after *elegit* the party cannot have a *capias* or *fieri facias*. *Extent*, 16.

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S. C. 1. Vent. 259. S. C. 2. Salk. 563. S.C. Carth. 455. S. C. 1. Ld. Ray. 346. 718. Cro. Jac. 12. 246. 1. Keb. 465. 1. Sid. 91. 1. Vent. 259. Dalt. Sh. 135. 2. Bac. Ab. 349. Dougl. 472. Tidd's Pract. 754.

upon *an elegit* the ſheriff is not deliver a moiety of each partinent and farm, but only certain , &c. making *in value* a moiety of the whole. Den, Leſſee of Taylor, *v.* The Earl of Abingdon, Dougl. 472.

(*b*) See poſt. 366. a ſecond argument.

To

PULLEN *againſt* PURBECK.

To which it was anſwered by NORTHEY, that a man's judgment ought to be ſatisfied; ſo a man ſhall have *fieri facias in infinitum*, till the debt be ſatisfied; with this difference, that the laſt muſt always recite the former, and what is levied by them, that the defendant may not be overcharged. And as to *elegit* he took this difference: FIRST, If there be any error not apparent on the face of the return, that may be rectified, upon examination, before it be filed; otherwiſe the filing is concluſive; but if the error be apparent on the record, that may be taken advantage of at any time: As if office find a man has twenty acres, when in truth he has but ten; if that be not avoided before filing, the party is without redreſs, if it do not appear on the face of the return. Here we are proper this way, for if we had brought a writ of error, it would be objected, that this is an error to our advantage, and therefore not aſſignable by us: and by the rules of authorities, where one does leſs than his authority, of entire thing, it ſhall be void for all; and if he exceed his authority, it ſhall be ſo too; and here it appears he exceeded his authority, by extending more than a moiety; and if we had entered here, we ſhould be found treſpaſſers in an ejectment; becauſe *the extent* is void in itſelf; and he quoted 1. *Sid.* 91. that if more than a moiety be extended, it is merely void; 1. *Vent.* 259. upon the diverſity above-mentioned; and he concluded by ſaying, that if we ſhall be eſtopped to ſay againſt the record, that the extent is good, in treſpaſs or ejectment againſt us, why may not we ſay with the record, that it is bad.

Poſtea 359. 364.

Vide Mo. 19. *Simile.*

HOLT, *Chief Juſtice.* If one has judgment for twenty pounds and ſues *elegit*, and the ſheriff returns, that he has levied ten pounds of his goods and chattels, and that he has no lands; and afterwards lands come to him, the plaintiff ſhall have a *ſcire facias* to extend thoſe lands; for it is the extending the lands, and not the ſuing the writ, that concludes; and there, if one ſue an * *elegit* againſt one, and return is made that he has no lands, he may ſue any new execution; but if lands to ever ſo ſmall a value be extended, he is thereby concluded. If office find a man has twenty acres, when in truth he has but ten, and thoſe ten are extended, the execution is good, while it ſtands; but he ſeemed to be of opinion, he might be relieved by *audita querela*. But if there be two judgments of one hundred pounds each, and *elegit* on one, and inquiſition finds he has twenty acres, and ten of them are extended; and then an *elegit* is ſued upon the other, and inquiſition finds he has twenty acres, and thereupon the other ten acres are extended, no *audita querela* lies.

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If on *elegit* return be made, that he has no lands, may have a new execution; but if any lands are found, he is concluded.

At which SIR B. SHOWER, at the bar, ſhook his head;

Whereupon HOLT, *Chief Juſtice*, ſaid, on his word it was true.

1. Sid. 91. 239. 1. Ven. 259.

And THEY ALL AGREED, that if it appeared on the record to be void, it might be given in evidence.

And

nd HOLT, *Chief Juſtice*, ſaid, it would be hard to avoid it by *ta querela*, for that would pull up all by the roots.

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HIS CASE was next argued in another Term, by SIR B. WER *for the defendant*, and CHESHIRE *for the plaintiff*.

HOWER. This ſort of execution was not at common law, created by the ſtatute of *Weſtminſter the Second*, c. 18. as ap- s by the ſtatute, 1. *Inſt.* 394. *Sir William Harbert's Caſe (a)*; common proceſs was only a *fieri facias* or a *levari*. So this ſta- gives a man a liberty of chooſing to have all his goods and chat- except, &c. and a moiety of lands and tenements; and when he determines that election, and the effect thereof appears on rd, he ſhall never after betake himſelf to a new remedy; but has judgment upon this, he may have any new execution he ſes, by *capias*, *fieri facias*, *levari*, or *elegit*; which the law does llow after election. *Br. Elegit*; after *elegit* one ſhall have ther proceſs. 19. *Hen.* 6. 4. 1. *Roll. Abr.* 904. 2. *Roll.* 8, 9, 77. And an *elegit* is a judgment in its nature; for he has made this choice, it amounts to a judgment that he have all his goods and chattels, and *medietatem terræ*; though be no form of words importing an award of the Court, yet rit iſſuing by virtue of the ſtatute, which tantamounts, as if Court had ſaid "*ſuper quo, &c.*" and therefore he can never lmitted to demand another execution generally; and here the ment, if any, muſt be general, for the prayer is ſo; and judg- muſt be according to the prayer.

CONDLY, They ſhould not make their prayer to have execu- as this is, generally, to have execution of the reſt of their ; but it ſhould be purſuant to their ſuggeſtion, * to have a extent of a moiety, or a new *elegit*; for though they would the extent void, becauſe more than a moiety, yet the fault of *xtent* cannot avoid the prayer of an *elegit*, which has been ; therefore he ſhould have a new one; for the ſubſequent act of fficer cannot alter the plaintiff's prayer; and they there per- will award them one, to do now well, what the officer has ill before.

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HIRDLY, This extent cannot be ſuppoſed void; *vide* 1. *Roll.* 305. *pl.* 8. this very caſe in point; that extent was not void, oidable by *audita querela*; *vide* 3. *Cro.* 310. *per* POPHAM; appear that the plaintiff had *extent* by former *elegit*; which cepted, he cannot have a new *elegit*; and if he take one it be void; but upon a ſurmiſe of more or leſs lands upon the n of the firſt, he may have a new *elegit*; and as to its being or voidable he quoted *Hob.* 48. 1. *Roll. Abr.* 304. There many caſes where *extent* ſhall be void; as if a ſtranger's land tended; but *the extent* is of the defendant's lands, and if there ny wrong, it is to him, and not to the plaintiff. 4. *Co.* 67.

(*a*) 3. Co. 11.

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If conuſee enter before any return of execution, he is a g
nant, though the common way be to bring ejectment; ye
plaintiff enter, he has a good title againſt every-body; t
be ſatisfied; ſo they may enter and hold here, after this
and if we had brought an *audita querela*, it would only av
ſurpluſage.

If extent be avoided by *audita querela*, muſt account for mean profits.

Quod HOLT, *Chief Juſtice, negavit*; for he ſaid, it woul
all, and make him account for the mean profits.

In *Dawſon v. Jefferſon (a)*, a *venire facias* to try an iſſ
jury find more than was put in iſſue, and void only for ſurpluſ
a new *venire facias* ſhall not go; for where an authority is ex
all ſhall not be void, but only the exceſs; but where the ſh
no authority at all, it is not ſo; as where he extends la
ſtranger; and a new *elegit* they cannot have for lands on
they have all his goods already, and no ſuggeſtion that he
ſince. He concluded, that there was no judicial opinion
him; for 1. *Vent.* 295. was only a ſaying upon motion; a
3. *Keb.* 313. was but the ſame caſe; and that none will
but the defendant may have an *audita querela* here; which
the extent is not merely void.

CHESHIRE *contra*. The firſt execution is void; for the
by the ſtatute, is a new authority to the ſheriff; which, *
of authorities, ought to be purſued ſtrictly, or elſe what is
upon it is void; notwithſtanding the favour the law gives
ecutions. If the ſheriff had extended all the defendant's
that had been merely void, becauſe he had exceeded his auth
and that he does by extending anything more, as well as by
tending all. 1. *Vent.* 259. *Office of Sheriff*, 135. 12. *Edw.*
Br. Elegit, 14. Of two acres the ſheriff may extend one;
two manors one, if they be of equal value; but a void act is
capable of a *magis et minus*. An act of parliament, introduc
of a new law in the affirmative, is negative of what is not exp
ſed therein. *Plow.* 109. 113. 206. *Hob.* 298. So has the c
ſtruction been made upon another branch, which impower
ſheriff to take all the party's goods and chattels, except
carucæ; and if he take them, treſpaſs will lie againſt him. 2.
133. 395, 396. *Elegit* lies not againſt an infant, though that
no exception of infancy in the ſtatute; becauſe the privileg
infancy ſhall not be taken away by affirmative words: So
paſs lies for taking *averia carucæ*, becauſe of the exception
ſtatute, this being an affirmative law, &c. is the ſame as if
were an exception of a moiety. Where there is any matter
which may avoid *the extent*, that muſt be complained of
return filed, or by *audita querela*, becauſe the fact may be con
verted. But where it appears on record of the return filed, i
ſelo de ſe, and needs no more to ſhew it ill done; as if judg
were, that the ſheriff ſhould extend more than a moiety, it w

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1. Vent. 259.
1. Sid. 91. 239.
1. Brownl. 96.
2 Lev. 160.

Ante, p 356.
Poſtea, 364.

(a) 3. Keb. 243.

As for the caſe of *Row v. Weeks (a)*, there is no reaſon it; and a man may be over cautious, and bring *audita* ithout neceſſity; *vide Hetl.* 66. *Lit. Rep.* 77. to this

s OBJECTED, that we have accepted this extent, and have d for nine years. I ANSWER, That depends upon this, the extent be void or voidable; if only voidable, it is e; if void, that muſt be abſolutely void, or void or void- lection; if void or voidable, our acceptance makes it abſolutely void, as I contend it is, no act or acceptance an help it; as *vide* 1. *Inſt.* 300. a thing may be made confirmation. If tenant in tail make a leaſe not warrant- ſtatute, it is void or voidable, at the election of the iſſue. s not an imperfect conveyance of an intereſt; but we ſay xecution of a * proceſs of law, which we can no more * [360] od, than we can make a good one void. If no land be upon an *elegit*, it is only in nature of a *ſcire facias*; . *ubi ſupra*; and if we are bound by acceptance of more ociety, they ought to be ſo too; for it were abſurd we tied, and they looſe; and by this argument, acceptance hole would be good. A deed indeed may be good againſt void againſt another; good againſt one's ſelf, and void ies; as deed of *non compos* is good againſt himſelf, and nſt heirs, executors, &c. but the reaſon of that is a par- axim in law, that a perſon of full age ſhall not ſtultify but that caſe is not like ours, which can better be com- inferior juriſdiction; as in caſe of proceeding *in* THE ALSEA, where they have not juriſdiction, he may againſt ſuit ſay, that they are void. 2. *Cro.* 353. *Mo.* 787. on to ſtay the party's own ſuit, and yet there juriſdiction e made. *Vernon's Caſe (b)*; If jointure be made for ſband, remainder to another for life; remainder to wife for her jointure; though he in remainder die, living and that after the huſband's life the wife enters, it is not nade a good jointure; becauſe at firſt creating it was not ointure. If a perſon qualified to keep two chaplains, re- e, and one of them dies before any of them is advanced to e, yet none of the other two are qualified for a plurality, f the original ill retainer, being not purſuant to the au- f the ſtatute (*c*). If a biſhop make a leaſe for four lives, of the lives expire, biſhop dies, his ſucceſſor ſhall avoid h it have all the qualifications except a legal commence- nt that exceeding the authority given by ſtatute, it is void). The dean put his ſeal to a leaſe, without the conſent ajor part of the chapter, but they aſſented to it after, yet id (*e*). If after the ſtatute of 11. *Hen.* 7. he in rever-

nv. Abr. 629.
o. 2.
a. 9.

(*d*) 10. Co. 32.
(*e*) Davis Rep. 44. 48.

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ſion releaſe to alienee of wife, without his conſent, the releaſe is void; becauſe it appears not of record. If upon the ſtatute of *Action Burnell*, lands be extended at too high a rate, the conuſee may pray that extender may take them at that rate, and pay him; and thereupon the ſheriff may deliver the land to the extenders (*a*): but there the party * muſt make his challenge at the firſt day of return, becauſe he has an election to except, or take the land (*b*). We cannot be eſtopped here, becauſe a void act cannot work an eſtoppel. 14. *Hen.* 7. (4.) 22. *Hard.* 465. No record eſtops, if the Court has not juriſdiction; and every eſtoppel is reciprocal. 1. *Inſt.* 352. Eſtoppels muſt either bind both or neither; ſo if they be not bound, if we ſhould bring an ejectment, we cannot be bound now.

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HOLT, *Chief Juſtice*, upon the argument now, ſaid, that what ſtuck with him moſt was the acceptance and length of time; for the ſheriff returned that he had delivered the land in execution, which imports an acceptance, and now he comes to avoid his acceptance after ſo long time; and where one comes to diſapprove *an extent* upon a ſtatute-merchant, he muſt ſay, that he has not accepted. So here, why ſhould he not come and ſhew that more than a moiety was extended? and if the ſheriff will return "*libe-* "*ravi parti*" where he refuſes to accept, an action will lie againſt him for a falſe return. And though it be a rule that things *ipſo facto* void cannot be made good by acceptance, yet it is not without exception; as if tenant in tail make a leaſe to commence *in futuro*, and die before the day, and the leſſee enter, the iſſue in tail may have treſpaſs againſt him, or he may by acceptance make it good. If tenant in tail make a leaſe to commence *in futuro*, and afterward make a feoffment in fee, and the leaſe commences, the feoffee may avoid it, or make it good by acceptance. If a tenant in tail of a rent grant it in fee, it is void by his death; but if the iſſue affirm it to be good, and bring a *formedon*, he may be barred by warranty. If the land of one purchaſor be extended, and the lands of another purchaſor omitted, if he whoſe land is extended bring *audita querela*, he ſhall avoid the whole; and there are two writs in ſuch caſes; the one an *audita querela*, the other only for contribution: And he ſaid, the caſe in *Brownlow* may be good or bad law, as it is put; for if there be two judgments, and the defendant is ſeiſed of twenty acres, and a moiety of them is extended upon one, and *an extent* goes upon the other; and inquiſition thereupon finds him ſeiſed of twenty acres, without any notice of the former *extent*, and hereupon the other moiety is extended; this is well, though in truth a moiety of the remaining moiety ought to be extended. And if the land of one purchaſor only be extended, the plaintiff has no remedy; yet the defendant has remedy by *audita querela*, and will make the plaintiff * account to him for all the mean profits. If there be two bound joinly

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(*a*) Bro. Abr. "Judgment" 148. (*b*) Year Book 44. *Edw.* 3. pl. 2. Moor, 751.

and

'erally in a bond, and one of them is ſued firſt, and judgment nſt him, and the other is ſued, and judgment likewiſe againſt ıe firſt is taken in execution, and after *elegit* againſt the whereupon his lands are extended; the firſt ſhall be diſd upon *audita querela*.

ATT, *Serjeant*, in *Trinity Term* after, argued for the det, and HALL, *Serjeant*, for the plaintiff.

ATT argued that *the extent* was not merely void; and that ere void, or voidable at election, it was only ſo at the elecf the defendant, and not of the plaintiff; and this being a bt, which the defendant muſt pay one time or other, he ink it an advantage to have more than a moiety of his land ed, for that the incumbrance may be the ſooner diſcharged; at this was agreeable to the reaſon of the law in other caſes; aſe of an infant, who, wanting underſtanding to contract, t by any act of his bind himſelf, except for neceſſaries; yet y make a leaſe, reſerving rent, which though void abſolutely, cauſe poſſibly it may be for his advantage, he may allow of n he comes of age; or he may have treſpaſs againſt leſſee ıtry; or bring debt for the rent, and make it good. *dw.* 4. 1. *a.* 2. *a* 3. *b.* 4. *a.* where in treſpaſs, the leſſee d as leſſee of plaintiff, who replied non-age in him at time e made; and adjudged he might have treſpaſs or debt for the So of a ſale of goods by an infant, he may have treſpaſs taking, or debt upon the contract; and it is made a *quære*, infant ſell a horſe, and take the money for him, whether he have treſpaſs; but if an infant make a feoffment and livery, ot void, but voidable; but if the livery be not by his own it is void. So if a *feme covert* make a leaſe, it is void; but join with her huſband in a leaſe of her land, it is at her n, after her huſband's death, to affirm or avoid it, becauſe be for her advantage: So here it may by poſſibility be for vantage of the defendant to have more than a moiety ex-; therefore he ought to have the election to affirm this or not; and this rule holds even upon conſtructions upon parliament; as by the ſtatute *De Donis*, there is an expreſs ty upon the donee or iſſues from alienating to bar the iſſue; tenant in tail has no more power to make a leaſe to bind the ter his death, than the ſheriff to extend more than a moiety, ſtatute; yet if a tenant in tail make ſuch a leaſe, his iſſue make it good, if he pleaſe; becauſe it may poſſibly be for vantage ſo to do; and a ſucceſſor may make a leaſe good, rranted by the diſabling ſtatute of *Queen Elizabeth*. It is d, that the ſheriff has but a bare authority, which he muſt ſtrictly, otherwiſe his act is intirely void; and what is alr void, cannot be made good by any ſubſequent agreeas in *Pennant's Caſe (a)*, a leaſe for years, with condition

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(a) Inde: the title of Harvey *v.* Oſwald, Moor, 456. Cro. Eliz. 553. 572.

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upon non-payment of rent at a day certain to be void, no ſubſequent acceptance will make ſuch a leaſe good; which caſe I agree to be law; for there the leſſor has made his election by demanding the rent, without which the leaſe had not been void; and ſince by his own act, *viz.* the demand, he has made the leaſe void, there is no reaſon that after, by another contrary act, he ſhould make it good. Another caſe is, where a tenant in tail makes leaſe, reſerving rent, and dies without iſſue, he in remainder cannot by acceptance make it good; which caſe I agree to be law, but not like this; for the rent reſerved, which is the recompence, cannot go to him in remainder for want of privity; and ſo it cannot be ſuppoſed for his advantage to have power to affirm the leaſe: Nor is the caſe of a tenant at will more like, for the leaſe is at will of both parties, and by conſequence muſt neceſſarily determine upon either party's ceaſing to have a will of continuing it. And, in many caſes, where one enters by colour of authority, without any right, yet if it be for the good of him that has right, he may make that colourable right, or act, good; as if one enter upon an infant, he may charge him as guardian, or bring diſſeiſin, at his pleaſure. If a man receive my rent, I may charge him as diſſeiſor, or have account againſt him (*a*). So in an account for money received to the plaintiff's uſe, the defendant ſhall not be admitted to ſay, that he is a wrong-doer; and therefore that ſuch an action will not lie againſt him. So if one enter into an office, he ſhall be looked upon as bailiff of the right owner, if he pleaſes; for if he, to whom a wrong is done, will take it as no wrong, the wrong-doer ſhall not have power to hinder himſelf from being charged, as one having lawful title or authority; and his own acceptance was ſo binding, that though it were all evicted after, yet he had no remedy. 1. *Inſt.* 289, 290. And, to fortify the acceptance, he put the caſe, where a man takes a leaſe of his own land, it is good againſt him, and he ſhall pay rent * becauſe of his acceptance by deed; ſo here it appears that he has accepted of record.

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HALL, *Serjeant*, *contra*, divided the caſe into two points:

FIRST, Whether *an elegit* returned and filed here, ſhould be a bar of a new *elegit*.

SECONDLY, If it is not, whether the *ſcire facias* to have the execution be good.

AS TO THE FIRST, That the new *elegit* was void, the ſheriff having exceeded his authority; for, he ſaid, all authorities, whether judicial or miniſterial, or private by one perſon to another, muſt be purſued; for when one has no right to do a thing, but by a derivative power, he muſt ſhew he has purſued his power; and eſpecially if the thing to be done be entire, and more is done than warranted by the power, all is void; and here the ſheriff had no

(*a*) Bro. Abr. "Account" 23.

power

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to extend more than a moiety. *Vide* 22. *Edw.* 4. 13. *a.* court of common pleas hold plea of murder, it is merely void. *dw.* 4. 8. *Kelway*, 106. *Dyer*, 135. *b.* A citation in the alty for a cauſe ariſing within the body of the county: a ſuit in arſhalſea where neither party is of the *hoſtel*. *Sir J. Davis*, 7. 10. *Co. Caſe of Marſhalſea*, *March*, 8. 10. And as to pri- uthorities, he quoted 1. *Inſt.* 303. 49, *&c.* *Cro. Car.* 335. . 35. 8. *Co.* 119. *Plow.* 393. *Hard.* 481. If com- ners of exciſe act beyond their commiſſion, they ceaſe to be s *pro tunc*: ſo the ſheriff here exceeding the power given it, what he has done is juſt as if he had had no writ at all. *w.* 4. 4. 21. *Hen.* 7. 19. 2. *Brownl.* 96, 97. for 2. and other proceſs after *elegit*, and the whole void, becauſe ling authority. *Cro. Eliz.* 160. *Elegit*, returned *extent*, could not deliver them, becauſe they were in execution prior *extent*; and thereupon the party took *a capias*; and on held no *ſuperſedeas* ought to go, becauſe otherwiſe he could ve preſent fruit of his judgment. So in like manner here it s we can have no benefit of the *elegit*; for if we enter upon xtent, we are treſpaſſers. 18. *Edw.* 4. 4. 1. *Sid.* 184. . 105. 261. And he quoted *Heb.* 57. If a plaintiff take *an* and can have no fruit of it, he may take any other execu- r have debt upon the judgment. And the ſtatute never to defraud the plaintiff of a juſt debt. And he inſiſted on erſity before mentioned, where, upon the face of the return, ears that more than a moiety was extended, and where not, reconciles all the Books. 1. *Sid.* 239. 2. *Inſt.* 396. t. 239. 3. *Keb.* 315. *Litt. Rep.* 77. * And as to the ob- n, that the *ſcire facias* was generally "to have execution," it ſhould be ſpecial, "to have a new writ of *elegit*," pur- to the firſt election, he ſaid it was better as it was, for if the ſhould be of opinion to give judgment for execution gene- they could not do it if the writ were ſpecial, as they may it is; and that on the other hand they might give a ſpecial ent on this general writ, for the writ recites the whole mat- nd pray convenient remedy, which the Court will give *ſe- m ſubjectam materiam.*—It is objected, that one ſhall not for error that which is for his advantage; and that is a true ccording to *Beecher's Caſe (a)*, 2. *Saund.* 45. *Bendl.* 154. ſhall not ſay his declaration was bad, to ſave coſts; and the is, becauſe then one would take advantage of his own to the prejudice of another; but this is wrong of the ſheriff, e error we aſſign is an eaſe to the defendant to have but a y of his land extended. The caſe in 1. *Roll. Abr.* 305. *p.* 8. eed the ſtrongeſt caſe againſt me; there it did appear upon turn, that more than a moiety was extended; and yet the ſays the defendant cannot avoid it, but by *audita querela*. that I anſwer, FIRST, That it muſt be intended that the

Nota the caſe in Dyer.

Ante p. 356. 359.

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(a) 8. Co. 58.

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plaintiff had entered by virtue of *the extent*, for the Book is, "plaintiff's entry was no diſſeiſin;" and it may be then actual entry the defendant is put to *audita querela*; but h entry cannot be ſuppoſed, becauſe we ſay execution remains made. SECONDLY, The writ of *audita querela* muſt hav brought by the defendant; but we are plaintiff, and no ſuc lies for us. THIRDLY, If it had appeared to the Court o affidavits that more than a moiety was extended, it would b to relieve, even upon *audita querela*, becauſe of the dan avoiding a record by affidavits. FOURTHLY, This caſe found in any other Book.—It is alſo objected, that the retu delivery to us amounts to an acceptance and entry by us. anſwer, that every acceptance or ſatisfaction implies two t FIRST, Good authority in him that gives the ſatisfaction. CONDLY, Conſent of him to whom it is given in ſatisfacti receive it in ſatisfaction; but here appears no acceptance and the ſheriff does not return that he delivered us the poſſ And he urged the caſe in *Dyer*, 299. *pl.* 31. where execution ſued by executor of conuſee, and the death of the conuſor re

* [366] and that * he died ſeiſed of the manor of *Brodley*, without ſt of what eſtate; and after *liberate* thereupon, and a return vice thereof, and that the executors had accepted thereof; a that the firſt execution was void, and that a new extent ſho *Vide Cro. Eliz.* 310.

HOLT, *Chief Juſtice*. Surely delivery implies an accep and he ſaid, it had been very proper to come and oppoſe the and he ſaid, that delivery in this is as complete a poſſeſſio given upon an *habere facias ſeiſinam* upon a recovery to u that poſſeſſion is not actual, but only ſuch as veſts the righ plaintiff, and makes the other continuing in a wrong-doer; upon he may bring his ejectment; and we ought to intend tual entry, if diſturbance appear not, and the eſtate of te *elegit* determines without more ado, upon levying of the by effluxion of time, if eviction or expulſion appear not. common law, if land of one purchaſer only had been exten might have avoided *the extent*, yet it was good againſt the till avoided; but he concluded that he thought *the extent* w but doubted only upon the acceptance; and he agreed, if *tent* be void, and the plaintiff entered by virtue of it, he be a treſpaſſer; and that the party cannot aver againſt the return.

At laſt it was argued in *Hilary Term*, in the thirteenth *William the Third*,

By COWPER *for the defendant*, and MULSO *for the p* upon the ſingle point of acceptance.

COWPER. It is agreed that prayer of an *elegit*, and thereof on record, is no bar of another execution, becauſe

ɔut the writ is not the election; for though *elegit* be taken
d goods taken in execution upon it, and no lands extended;
:s not conclude from taking out a new execution; and this
himſelf, who would carry the matter very far, does agree.
ís appears by the ſtatute of 32. *Hen.* 8. c. 5. before which
in execution had been evicted, the plaintiff had no remedy;
v that ſtatute gives *ſcire facias* to have execution of the
; and he concluded from thence, that if this *ſcire facias*
upon the ſtatute, it would lie not at all. Before and ſince
tute one may have ſeveral writs of *elegit*, but they muſt be
e continued execution; for a man cannot have two writs
', to execute one firſt, and then another, but they muſt be
ıtinued execution, as an *alias* and *pluries*: Upon *nil* re-
ıpon the firſt, he may have a ſecond, which is a continuance
rſt. 21. *Hen.* 7. 19. *Br.* "*Elegit*" 17. An *elegit* may Vide 1. Sid. 437.
ı * a *teſtatum* into another county, or upon an *alias teſta-* * [367]
ɔ the ſame county; but there the plaintiff muſt come into
rt and have an entry made, &c. *Cro. Eliz.* 310. One
re ſeveral *elegits* into ſeveral counties, but that ſtill is but
cution. *Raſt.* 265. *a. Petit ſeparalia brevia*; but once
returned executed, if the party do not immediately come
ept to it, it is final. *Cro. Jac.* 338. 1. *Roll. Rep.* 8.
king *extent* of lands upon an *elegit*, is like taking a leaſe
s in ſatisfaction of your debt; ſo that *the extent* is a ſatis-
ın law. 22, *Edw.* 3. 17. *Aſſ. pl.* 44. That there may
extent for the plaintiff as for the defendant, but held it
when he comes at the return of the writ, and ſhews reaſon
t is filed. So is 44. *Edw.* 3. (2.) *pl.* 15. Conuſee after
iled, prayed the extenders ſhould take the land according
:atute of *Acton Burnell*; but the Court told him he was
for the ſheriff had returned that he had accepted the land.
'*Extent*" 12. 19. *Edw.* Land was extended twice, and
uſor could have no remedy, becauſe he did not come at the
. *Moor*, 341. 1. *Roll. Abr.* 204. *Cro. Eliz.* 310. he
'e for him: It was a ſale of a term by virtue of a ſecond
fter a former returned and filed; and held that the ſecond
y voidable at moſt. But *Moor* ſays, that if it appeared
land upon the firſt *elegit* had been extended and accepted,
after he took a new *elegit* and extended other lands, it were
void; for upon return of the firſt on record, the plaintiff is
ourt. And POPHAM, in 3. *Cro.* 310. ſays, "*ſuper quo*
laintiff came, *viz.* at the return of the writ." And the
ſuch" is remarkable in the report of the caſe in *Moor*.
' IS OBJECTED, that in none of the caſes aforeſaid it ap-
ı the very return that more than a moiety was extended.
t will not be pretended this *extent* is ſo great a nullity, as
git had been ſued out at all, or but a *fieri facias*, for here
ls in execution by it, which could not be but upon this
ır upon *elegit* the goods are to be appraiſed and delivered
aintiff himſelf; upon a *fieri facias* they are to be ſold, and
the

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the money to be given to the plaintiff. And here the execution was regularly awarded, and extent returned and accepted, and acquieſcence of nine years: and if *the extent* be void, they are diſſeiſor; and the caſe in *Roll. Abr.* 305. is full, that the plaintiff would not be a diſſeiſor in this caſe, which proves that this is not a void *extent*. 44. *Edw.* 3. 11. *pl.* 14. 22. *Edw.* 3. 14. *pl.* 44. Conuſee of ſtatute * Merchant takes *an extent* returned of part of the conuſor's lands, and after prayed a new *extent*; but PER CURIAM, he is too late after acceptance. *Br. Eleg.* 9. *pl.* 3. one cannot have execution of *elegit* after acceptance.—BESIDES, it muſt be intended the plaintiff is ſatisfied by perception of the profits all the while; for it cannot be intended he received them to the uſe of the defendant, and if he be ſatisfied, no matter how; for if he had accepted a leaſe for years in ſatisfaction, it would be well; if one has judgment againſt two, and one make ſatisfaction, it is enough; *à fortiori* he cannot have it againſt one twice. Then it is for the advantage of the defendant, that but one moiety is only extended, and *quilibet poteſt renunciare juri pro ſe introducto*; why then may not the defendant here have the liberty to make this extent void, rather than be put to his action for the mean profits against the plaintiff; which muſt be the conſequence of the caſe, though a pence above the value be extended, if the whole *extent* be therefore void? But it is objected, that it does not appear the plaintiff ever entered, or took the profits, for the actual poſſeſſion was in him by the extent; but his only way to get it was by ejectment, which he could not maintain upon this return, it being according to the ſtatute. To this I anſwer, that the plaintiff by *the extent* has the legal eſtate in him, and it would be a wrong in the defendant to continue in after; and an ejectment is not neceſſary, but to gain a quiet poſſeſſion againſt ſuch wrong, which appearing ſhall not be preſumed, but rather the contrary, for the law will intend everybody innocent till the contrary appear.

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MULSO agued much as others had done before him, and on the ſame principles.

PER CURIAM. Without the ſolemnity of argument at the Bench, this, clearly, is a void *extent*; it appearing, on the return filed, that more than a moiety is extended; and without doubt what is extended beyond a moiety is without authority, therefore void; and ſince that cannot be ſevered from the reſt, it ſpoils all, and is the ſame thing as if nothing at all had been extended: And though the plaintiff did accept it, yet he had no means to get actual poſſeſſion, or to defend his poſſeſſion againſt the owner of the land; and ſo it is *ipſo facto* void, and needs no judgment or *audita querela* to avoid it, becauſe it is directly againſt the ſtatute of *Weſtminſter the Second*, c. 18. by which an *audita querela* is given; and the right diverſity is where the inequality appears on * the return, and where not. So that the *ſcire facias* recited in this ſpecial matter is very proper.

Where on the return it appears, that more than a moiety was delivered, it is abſolutely void, and needs not judgment or *audita querela* to avoid it.

* [369]

And an award of execution was granted PER TOTAM CURIAM. Thus

tione NORTHEY. The curſitor, who had made out a of error wrong, contrary to his inſtructions, came and fidavit that his inſtructions were right; and thereupon ruled to amend it, *niſi*, according to *Blackmore's Caſe*. it was to certify a record of a judgment in the time of g, and the record certified was in the time of the d *Queen*; and it was moved to amend the writ. And it , that if this had been an original upon a bond bearing date me of the *King and Queen*, and the officer had made it bond in the time of the king only, it would be amended; ght here, he varying from his inſtructions: Here it was hat want of form in an original is not at all amendable, as *tt detinet*" inſtead of *detinet*, or *vice verſâ*. So if judgment iſt five, and one of them die, and error is brought and laid *um* of four, without mentioning the fifth, this was not l, becauſe want of ſkill in the clerk; it was the caſe of *v. Stoke (a)*. But theſe are faults in the eſſential part of ; whereas this here is but a plain miſtake in not following ions. Debt was againſt an heir, and not ſaid in the de- that he bound his heirs, amended. 1. *Leon.* 134.

Writ of error refuſed to be amended, though an affidavit was made that the curſitor's note was right; it being to deſtroy a judgment.

S. C. 2. Lutw. 1211.
S. C. N. Lut. 380.
S. C. 1. Salk. 49.
S. C. Carth. 520.
S. C. 1. Ld. Ray. 564.
S. C. Ray. Ent. 335.
S. C. Holt, 452.
S. C. Lex Man. Aſſ. 67.
1. Ld. Ray. 71.
5. Mod. 69.
1. Sid. 54.
3. Lev. 344.

PER *contra*. This original is very different from others, to reverſe a judgment, and therefore out of the letter and of the ſtatute of 8. *Hen.* 6. c. 12. the words are, "That udges before whom the record is ſhall amend writs, &c. irmance of judgment, what ſhall ſeem to them to be miſ- of clerks." So their power of amendment is to affirm, everſe judgments; and he quoted 1. *Roll. Abr.* 154. *Cro.* 4. that the record is not removed. *Dyer*, 105. *a.* 206. *br.* 754. And this amendment contended for would indeed a new writ; and there is no fault in the writ, but that it nds them to ſend a record which they have not, and they other. *Vide* 32. *Hen.* 6. 12.

T, *Chief Juſtice*. The deſign of all writs of error is to the judgment, and the ſtatute of 8. *Hen.* 6. c. 12. is in on to * that; and this is a good writ, and there is no autho- amend a good writ; and a record in the late reign is not this reign; and if writ of error in ſuch a judgment ſhould *ur. noſtra?* And there is no inſtance of amending writs of

* [370]

ER CURIAM the rule was diſcharged.

Michaelmas Term, in the eleventh year of *George the Firſt*, caſe of *Ginger v. Cooper (b)*, the curſitor had orders to

Ld. Ray. 71. 151. (b) 2. Ld. Ray. 1403.

make

THOMKIN *againſt* CROCKER.

make out a writ againſt five, one being dead, and he made a writ only againſt four, and held not amendable; and full c given on quaſhing the writ of error.

Caſe 614. The King *againſt* The Inhabitants of Shippingdon.

Order of juſtices concluſive, till ſet aſide on appeal.

A POOR PERSON was removed by order of two juſtices for *Warwickſhire* to *Oxfordſhire*, and the juſtices of *Oxfordſh* remove him by a new order to *Berkſhire*.

The ſecond order was quaſhed *niſi*, for that by the firſt pariſh in *Oxfordſhire* was adjudged to be the place of his laſt ſettlement; and that order is concluſive to them, till falſified appeal, not only as to *Warwick*, but as to all other places; the ſeſſions have no power to make a new order; but the way to ſend him back from whence he came, and for the juſtices *Warwick* to make a new order; and if on appeal the firſt order confirmed, the parties are for ever concluded, as to all places.

Though *B. R.* will not affirm an order, are not obliged to quaſh it.

But at another day, becauſe it would be a vaſt way to ſend back,

HOLT, *Chief Juſtice*, ſaid, Let it ſtay; for though we can affirm it, yet we may ſtay the quaſhing of it.

NOTE, Here it was only ſaid, that it appeared to them he *likely to become chargeable (a)*, without ſaying, that it was on plaint of the churchwardens, &c.

Poſtea, 376.

HOLT, *Chief Juſtice*, ſaid, that muſt be intended.

(a) Now by 35. *Geo.* 3. c. 101. no perſon can be removed until they are chargeable.

Caſe 615. Anonymous.

Niſi prius is on the *diſtringas*, that the parties might know the jury.

PER CURIAM. The reaſon why the *niſi prius* is upon *diſtringas*, is to the end the jury might be returned above, the parties might know them, in order to their challenges; before the ſtatute of 42. *Edw.* 3. c. 11. it was always upon *venire facias*.

Caſe 616. Anonymous.

No coſts for new trial granted for irregularity; *aliter* if on the merits

PER CURIAM. If a new trial be granted for irregularity, ſhall be no coſts paid for it; but if defence be made, it help the irregularity. If new trial be upon the merits of the ca there muſt be coſts (a).

(a) See Hullock on Coſts, 383. 387.

* Butler and Lewin *againſt* ———.

Caſe 617.

IEY brought a joint action upon the caſe, for a falſe return to a *mandamus* to ſwear them in as churchwardens of the pa- of ———.

A joint action does not lie for a falſe return to a *mandamus*.

ter verdict IT WAS MOVED *in arreſt of judgment*, that they niſconceived the action by making it joint; for the damages, the loſs of fees, are ſeveral.

Ante, 349.

id this exception weighing much with the Court, the matter compromiſed (*a*).

id PER CURIAM, Here, though the motion be made in arreſt lgment, yet, if there be no rule to ſtay, the plaintiff may ſign dgment of courſe.

If there be no rule to ſtay judgment, it may be ſigned.

(*a*) See Eſpinaſſe Dig. 686. and 9. *Ann.* c. 20.

Anonymous.

Caſe 618.

RIT OF ERROR of a judgment in a recognizance upon a *ſcire facias*, was "*Quia in adjudicatione executionis ſuper icium præd.*" inſtead of "*ſuper recognitionem præd.*"

Error in the entry of judgment on recognizance.

id was for that quaſhed.

Boiſe *againſt* Bruerton.

Caſe 619.

IGINAL ſued out to *Suffolk*, and the action laid in *N.* and judgment thereupon reverſed for this error.

Original in a different county.

Keeling *againſt* Morrice.

Caſe 620.

VENANT againſt the adminiſtrator of the aſſignee of a erm generally in his own name, upon a covenant, in the ori- demiſe, to repair; and a breach in his time.

The *adminiſtrator* of the *aſſignee* of a leaſe, is liable for a breach of the covenant to repair, although the *aſſigns* of the leſſee are not mentioned in the covenant, for it runs with the land.

id agreed, that this covenant ran with the land, and bound oſſeſſor without the word "aſſigns." 5. *Co.* 15. and *Dean hapter of Windſor's Caſe*, *Mo.* 399. 1. *Cro.* 229. *Jo.* 245. he ſhall not ſay, I ſhall not be charged for my own wrong ant of aſſets, for it is his own act to adminiſter, and he is ned to have known the covenant annexed to the leaſes; as s executors, under pain of *devaſtavit*, are obliged to take of their teſtator's debts by bonds, and give preference of nt to them; and he might have diſcharged himſelf, by aſg over before breach. And by the ſame reaſon that he ſhould rged for the rent *de bonis propriis*, ſo he ought here for the es. 2. *Inſt.* 302. An executor or adminiſtrator ſhall be puniſhed

Poſt. 384.

KELLING *againſt* MORRICE.

puniſhed for waſte, whether voluntary or permiſſive, though no damages are recoverable in it. 1. *And.* 51, 52. 5. *C. Hargrave's Caſe. Allen*, 42.

And judgment was given for the plaintiff, *niſi*, before the end of the Term.

* [372]

Caſe 621.

* Anonymous.

Venue.
Poſt 515.
1. Sid. 405.
2. Stra 858.
2. Bl. Rep. 1031.

RULE. The common counter affidavit to hinder the change of *venue* is to give evidence *de materiâ in exitu*, where the action is laid.

2. Term Rep. 275. Tidd's Pract. 366.

Caſe 622.

Car *againſt* King.

Cohabitation ſufficient to charge a man as a huſband.
Ante, p. 245.

DEBT againſt a huſband for the lodging of his wife, and plea only made, that he formerly cohabited with her, and owned her as his wife.

AND HELD ſufficient to charge him (*a*); but that he might charge himſelf by giving *elopement* in evidence (*b*); for they that will truſt a wife that has eloped, do it at their peril (*c*).

(*a*) See Langford *v.* Tyler, Salk. 113. Stockland *v.* Charland, Burr. S. C. 508. Norwood *v.* Stevenſon, Bull. N. P. 136. Hudſon *v.* Brent, Eſpinaſſe Dig. 124.

(*b*) Manwaring *v.* Sands, 2 [illegible] 706.

(*c*) See Mr. Nolan's note to the caſe of Bolton *v.* Prentice, 2, Str. 1214.

Caſe 623.

The Farmers of Newgate Market *againſt* The Dean and Chapter of St. Paul's.

In what caſe one man may have an *caſement* upon another's premiſes.

AT *niſi prius* before HOLT, *Chief Juſtice*, the queſtion upon evidence was, Whether every houſe in the market ſhould not ſo many feet of ground towards the market belonging to it.

HOLT, *Chief Juſtice*. If the act for building of *London* obliges a man to build his houſe contiguous to his neighbour's ſoil, it by neceſſary conſequence gives you all eaſements over your neighbour's ſoil, as lights, paſſage, &c. without which you cannot uſe your houſe, but thereby gives no intereſt in the ſoil.

Witneſs intereſted.

And in this caſe, a houſe-keeper, who pretended the like intereſt before his door, though he derived his title under another perſon, was denied to be a witneſs.

Anonymous

Anonymous.

Caſe 624.

T, *Chief Juſtice.* A difference has been taken, that if : come in upon a *cepi corpus* in cuſtody, he muſt plead ·; *ſecus* where he has been bailed, and comes in upon the it ſurely there is no reaſon for this difference, for the return me in both caſes; and the party ought not to be the harder ;auſe he could not find bail.

There is no difference as to time of pleading, whether a defendant come in upon a *cepi* in cuſtody or on bail.

Poſt. 404.

* [373]

Stout *againſt* Towler.

Caſe 625.

CER COWPER, barriſter at law, juſtice of peace, and ain of the militia, and one *Maſon* and *Rogers*, having been and acquitted in *Auguſt* before, at *Hartford* * aſſizes, of rder of *S. Stout*, a quaker-woman (*a*); an appeal was : within the year, by *an infant* twelve years old only, next he deceaſed, but he was not mentioned in the writ to be t; and delivered to the under-ſheriff, *Towler's clerk*, in s abſence. The appellant after the *teſte*, and before the f the writ, choſe the deceaſed's mother for his guardian, HOLT, *Chief Juſtice*, in his chambers, and ſhe was then re accordingly admitted. After the writ was returnable, her of the appellant, at the inſtance and procurement of , came and demanded the writ of the ſheriff, and the ſheriff, : any aſſurance that the infant was the appellant, or that y who came with him was his mother, delivered the writ , who deſtroyed it.

If an *infant*, as next heir, ſue out a writ of appeal, and deliver it to the ſheriff, and the ſheriff, after guardian appointed, and before the return of the writ, by colluſion with the appellee, induce the infant and guardian to recall the writ, and deliver it to them accordingly, it is a contempt of the proceſs of the court, for which he may be fined; although the Court is not in poſſeſſion of the writ until it is returnable; and the guardian may diſcontinue the appeal.

S. C. Holt, 483.

his appearing to the Court, by the ſheriff's own confeſd he being put to anſwer interrogatories confeſſing further, upon receipt of the writ, had ſent a copy of it to *Cowper*, ndant's brother, and likewiſe notice to *Cowper* the de-

;

PER, the appellee's brother, being king's counſel, SIR B. IR and WARD urged in behalf of the ſheriff, FIRST, e infant having no guardian at the time of the writ pur- it was not well ſued out. SECONDLY, Though it were ſued out, yet the appellant had a right to come and recall the ſheriff ought not to deny to give it him; for otherwiſe ld be liable to an action, if after ſuch denial he executed t, and thereby ſubjected the appellant to fine and impriſon- n caſe of acquittal. *Vide* 3. *Bulſt.* 97, 98. 1. *Roll. Rep.* 41. *Latch*, 19. That the ſheriff in that caſe muſt take of the plaintiff, at his peril. And the appellant's being an lters not the caſe; for the law, if it enable him to ſue out will enable him to recall or diſcontinue it; as *a feme covert*

* the trial of this very extraordinary cauſe, 5. State Trials, 194 to 199. 485 to 510.; and 10. St. Tr. 221.

levying

STOUT *againſt* TOWLER.

levying a fine may lay the uſes of it. And 1. *Roll. Abr.* 2 an infant diſcontinued the appeal in deſpite of the guardi THIRDLY, It was urged, that this Court were not poſſeſſed of writ till the return, for till then it was not pending; and therefo what is done in relation to it cannot be a contempt of the Cou or examinable here. FOURTHLY, The being of a guardian h is not material; for he has nothing to do till the writ is return and till then the ſole right is in the infant.

No guardian neceſſary to ſue out an appeal for infant.

To which it was anſwered AND RESOLVED, as to the firſ that there needs no guardian till the writ be returnable; for th uſe of a guardian is to purſue it when it is before * the Court, n not, as here, to complain of the officer for not making a return

* [374]

and that anybody might ſue out the writ for the infant, as well a enter upon a diſſeiſor of him; and there is nobody in law whoſ writ it is, before the return, but the infant's. SECONDLY, On of age may come and recall the writ; but this being an infant, it is otherwiſe; and he could not releaſe this ſuit; and if he, at the return of the writ, had been preſent in court, and the guardian no there, he ſhould be nonſuited, which puts an end to the appeal *Latch*, 173. and that ſhews that the infant, after guardian choſen, has nothing more to do with the matter. Indeed the Court, if they ſee occaſion, may ſuffer him to diſcharge his guardian, and diſavow the action; but that muſt be in court, and the Court may refuſe to do it, if they ſee good reaſon in their diſcretion. And if an infant, pending the ſuit in treſpaſs, &c. comes of age, and judgment be againſt him, he ſhall be fined. The law in this caſe takes care that the guardian, ſuch as the Court ſhall appoint, ſhall ſue for the infant, and the Court and law have the immediate care of infants, as not being able to help themſelves; and it were an odd thing, that an infant, who cannot otherwiſe proſecute but by guardian, ſhould be able to diſcontinue his writ; or that he, by himſelf, could diſcontinue out of court what he cannot, but himſelf, continue in court. And as to the third objection, he ſaid, that though the Court had not poſſeſſion of the writ till it was returned, yet ſurely they may bring their officer to an account, what writs he has returnable in this court, and puniſh him for any abuſe in relation to them (*a*); and ſuch miſdemeanor is a contempt of the Court; and he quoted the caſe of one *Stanley*, ſteward of *Windſor* court, where it was adjudged, that a miſdemeanor in an inferior court is an offence againſt this court: and the caſe of 28. *Hen.* 6. *pl.* 28. was likewiſe quoted by him; where a ſheriff was fined forty pounds for refuſing to make a return; and he ſaid, if any ſheriff in *England* had ſerved him ſo, he would lay him by the heels. And here he ſaid, it were better, in this caſe, if the writ had mentioned the appellant to be an infant; however, it was well without it: And returning the writ to the infant and a ſtranger here, is the ſame as if he had delivered it to

(*a*) If after writ of error out and before return execution be executed, we would lay them by the heels.—NOTE *to former edition.*

a ſtranger;

er; if we ſuffer this to go unpuniſhed, the ſubjects muſt
ut little juſtice; for the ſheriffs ſhall have it in their
o anticipate our juſtice. And this is not a private matter,
king is concerned; for though the appellants be nonſuited,
king ſhall proceed upon it; and if the * appellee be ac-
before, he muſt plead it, for we cannot take notice of it.

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* [375]

here he was judged in contempt, by HOLT, *Chief Juſtice*,
ULD, *Juſtice*, againſt TURTON, *Juſtice*, and fined two
marks.

E, In this caſe, the year having expired, they could not
iew writ of courſe; and for this they petitioned THE LORD
t for a new writ; who aſſembled TREBY, *Chief Juſtice*
ommon pleas, SIR JOHN TREVOR, *Maſter of the Rolls*,
VELL, *Juſtice*, to adviſe of it; WHO ALL AGREED, it was
nary to grant one or no; but agreed it was not proper to
ome, eſpecially TREBY, *Chief Juſtice*, alledging for rea-
t an appeal was a revengeful odious proſecution, and there-
:rved no encouragement.

If an appellee continue to fruſtrate the effect of an appeal until the year and day expire, the court of chancery may in its diſcretion grant a new writ.

hich occaſion HOLT, *Chief Juſtice*, with great vehemence
l, ſaid, that he wondered that any *Engliſhman* ſhould brand
al with the name of an odious proſecution; that for his part
:d upon it to be a noble proſecution, and a true badge of
liberties; and referred to the ſtatute of *Glouceſter*, and
ıment thereupon in the *Second Inſtitute*.

Anonymous. Caſe 626.

iſi prius coram HOLT, *Chief Juſtice*, in an avowry for a
it-charge deviſed to the plaintiff, he could not produce the
it belonged to the deviſee of the lands charged, who
them by the ſame will; but he produced the ordinary's
of the will, and proved former payments; and held ſuf-
:vidence.

In avowry for a rent-charge by deviſe, the regiſter of the will, and former payments good proof.

will was, "I deviſe my lands in the pariſhes of *A.* and *B.*
. *S.* and I deviſe a rent to *J. N.* out of my lands in the
h aforeſaid."

A rent chargeable on lands.

per HOLT, *Chief Juſtice*, It is good to charge the lands in
:iſhes.

Adams *againſt* Arnold. Caſe 627.

SPASS for an aſſault upon the plaintiff's wife, and getting
with child; and what the wife declared in her labour re-
o be evidence (*a*).

In *crim. con.* the declaration of the wife is not evidence. S. C. Holt, 238.

(*a*) ne point ruled in the caſe of Morley, Guildhall 1739. Bull. but a diſcourſe between her leſendant may be proved: ſo letters written to her by the deſendant may be read as evidence againſt him, though her letters to him will be no evidence, Eſpinaſſe Dig. 343.

Plaintiff cannot diſcredit his own witneſs.

And here HOLT, *Chief Juſtice*, would not ſuffer the pl to diſcredit a witneſs of his own calling, he ſwearing a him (*a*).

(*a*) Ruled accordingly by THURLOW, *Lord Chancellor*, in Mr. Haſtings's caſe, 11th *June* 1789, in the Houſe of Lords. But ſee Bull. N. P. 296, 297. i caſes the credit of a witneſs may peached.

* [376]

Caſe 628.

* The Pariſh of Ovencot *againſt* the Pariſh of Grin

Seſſions can only affirm or quaſh, not make an order.

AN order of ſeſſions recited an order of two juſtices, for ſettling a poor perſon in the pariſh of *Ovencot*, and conc in the nature of a ſpecial verdict, *viz.* "If the poor of right bel "to the pariſh of *Ovencot* we confirm, if to the pariſh of *Gri* "we quaſh the order; but to which it does belong of right, "ſubmit to the court of King's Bench."

IT WAS RESOLVED, that the ſeſſions had no power to orders for ſettling poor; but their buſineſs was only to qua confirm orders, on appeal to them.

A *certiorari* to remove an order from *ſeſſions* is good, though there has been no appeal. S. P. poſt. 402.

IT WAS OBJECTED, that here no appeal appearing, the qua ſeſſions were not legally poſſeſſed of the order, and then it not be removed by *certiorari* from the ſeſſions hither.

HOLT, *Chief Juſtice*. It is proper for the juſtices that the original order to bring it to the ſeſſions, that it may be en on record there; and it were to be wiſhed that were practiſe when I receive a recognizance in my chamber, I ought to bri into court (*a*): and ſince in like manner, an order of two ju may well come to the quarter-ſeſſions by the hands of the ju that made it, it may well be removed from thence hith *certiorari*.

The court will not quaſh an order of removal, becauſe it only ſays the pauper was *likely to become* chargeable.

THEN IT WAS OBJECTED againſt the firſt order, that it i enough to ſay, that the poor perſon is likely to become charge for if he bring a certificate from his former pariſh, that in caſe he become chargeable, they will take him back, he is not remov by the ſtatute of 9. *Will.* 3.

PER CURIAM. That ought to come of the other ſide, would be ground for an appeal (*b*). And we are bound *ex d juſtitiæ* to confirm an order, if nothing appear why it ſhould b alide.

And the order of ſeſſions was quaſhed, and the other confir

(*a*) See S. P. poſt. 402. (*b*) See Rex v. Shippenfarringdon, ante, p.

Paran

Paramour *againſt* Johnſon. Caſe 629.

UMPSIT upon ſeveral promiſes; plea, that the defendant id ſuch a ſum, in ſatisfaction of all promiſes, till ſuch a hich the plaintiff received in ſatisfaction; ABSQUE HOC, made any promiſe ſince.

Matter in law which avoids the action, may be pleaded generally; and that matter given in evidence. Ante, p. 97. 101. 121. 214.

plaintiff demurred, for that the plea amounted to the general).

T, *Chief Juſtice.* It is no true rule, that where defendant ad the general iſſue and give the ſpecial matter in evidence, not * plead ſpecially. Wherever you may plead matter in ich avoids the cauſe of action you may plead generally, e that matter in evidence; or you may plead it ſpecially; n all general iſſues you may give ſpecial matter in evi-

S. C. 1. Ld. Ray. 566. 4. Bac. Abr. 60. * [377]

If you *give colour*, you may plead it ſpecially; as in debt , you may plead *nil debet*, and give releaſe in evidence. *ſield's Caſe* (*b*), where in treſpaſs for goods, the defendant s the taking, but ſays he bought them in market overt. is indulgence to give accord with ſatisfaction in evidence *on aſſumpſit* pleaded; but that has crept in, and now is

Ante, p. 354. Poſtea, Paſch. 13. W. 3. Saunders's caſe. Gilb. C. B. 65.

here it appearing the ſums paid were leſs than thoſe de- ipon, the plaintiff had judgment; THE COURT holding, been a collateral ſatisfaction, the plea had been good.

Vide 1. Inſt. 212. *b.*

See 1. Com. Dig. "Accord" (A. 1.) page 96. (*b*) 10. Co. 88.

Anonymous. Caſe 630.

T, *Chief Juſtice.* If a writ of execution be taken out thin the year, and the ſheriff make no return to it, upon ; a *vicecomes non miſit breve* once a year, you may continue ot be put to ſue a *ſcire facias.*

Execution after the year without *ſcire facias.* Ante, 84.

The King *againſt* Chaloner. Caſe 631.

nformation was againſt him for killing my Lord *S.*'s dog, ing forth, that Lord *S.* was riding in the vill of *D.* in the of *Middleſex*, and that his greyhound being *tunc et ibidem* g him, the defendant drew his ſword, and *tunc et ibidem* e dog. Not guilty pleaded; and at *niſi prius* the defen- *cta verificatione* confeſſed the action; and THE POSTEA hat at *niſi prius* at ſuch a day, the defendant *relicta verifi-* e confeſſed the action."

A confeſſion entered on THE POSTEA thus, "that at *niſi* "*prius* on ſuch "a day, the "defendant "*relicta veriſi-* "*catione* con- "feſſed the ac- "tion," is bad.

, *Chief Juſtice.* You ſhould not have mentioned the *niſi* all, but have entered it as of a Term before; or, ſince you

THE KING *againſt* CHALONER.

have mentioned it, you ſhould have ſhewed that the jury was called, &c. and then the defendant *relicta*, &c. for now you tell us of a *niſi prius*, and ſhew nothing that was done there.

Averment that *A.* was at *D.* in *Middleſex*, and that his dog was *then and there* following him, ſhall extend to both places.

BROTHERICK excepted, that it did not appear what county the dog was in; for though Lord *S.* is ſaid to be in *Middleſex*, the dog might be in another county, and the *adtunc et ibidem* ſhall only go to the vill, which may extend to more counties than one.

SED PER CURIAM, It ſhall go to both.

* [378]

Caſe 637.

* Aſhmond *againſt* Ranger.

Treſpaſs will not lie by the leſſee or copyholder for life againſt the lord of the manor, for cutting trees on the eſtate, although he do not leave ſufficient for reparations, and the cuſtom of the manor is that every copyholder for life ſhall have all timber trees, &c. for reparation of the premiſes.

S. C. 11 Mod. 18.
S. C. Salk. 638.
S. C. Holt, 102.
S. C. Comy. 71.
S. C. Fort. 152.
S. C. 1. Ld. Ray. 551.
1. Leon. 272.
1. Roll. Rep. 196.
1. Roll. Abr. 108.
1. Brownl. 231.
2. Com. Dig. "Copyhold," (K. 7.)
Vin. Abr. "Copyhold," (E. c. 7. pl. 11.)
2 Term Rep. 26

TRESPASS by leſſee for years of a copyholder's widow, holding in of her widow's eſtate according to the cuſtom, againſt the lord, for cutting and carrying away ſeveral timber-trees upon the copyhold land.

And in this caſe ſeveral queſtions were moved at the Bar.

FIRST, Whether the lord could enter upon the copyholder, and cut trees for his own uſe?

SECONDLY, If he could not, in caſe he did it, what remedy the tenant had againſt him; whether treſpaſs or caſe, or both?

THIRDLY, Whether in caſe the lord cannot do it, whether the tenant may; or in caſe he cannot juſtify cutting, whether by cutting he forfeits his eſtate?

And it was ſaid at the Bar, that a copyholder might cut for neceſſary repairs, and eſtovers, and not otherwiſe; therefore the lord may cut them, or elſe it would follow, that here would be a noble wood, and nobody have right to cut it; and ſo it would be uſeleſs to the public, and never to be cut in caſe of copyholder in fee.

But NORTHEY, who argued thus, ſaid, if the lord in that caſe ſhould cut down all the wood, or ſo much of it as not to leave ſufficient for repair and eſtovers, the tenant's remedy was by action upon his caſe, and not by way of treſpaſs; as where a man grants eſtovers out of his wood, and after cuts all down, or ſo much as not to leave ſufficient eſtovers, his remedy is caſe, and not treſpaſs. *Mo.* 727. *Cr. El.* 629. And he ſaid, it was abſurd to ſay that the lord, who had the intereſt of the trees, ſhould not have power to cut them; and *Coke* in his caſe of *Heydon v. Smith* (a) ſays, the lord without any ſpecial cuſtom may cut the trees; and he that has the ſpecial intereſt of a thing, cannot hinder him that has the general intereſt from uſing it; but if he uſe it ſo as to deſtroy or impair the ſpecial intereſt, he has his action upon his caſe. And copyholder for life cannot open a mine, for tenant for life at common law cannot do it.

(a) 13. C. 67. S. C. Godb. 72. S. C. Coke's Cop. 79 S. C. Brownl. 98.

[I]

T WAS ARGUED *contra*, that the copyholder had the ſame reſt in the trees that he had in the eſtate; and there is no erence between a copyholder for life or in fee, and tenant life or in fee at common law but what the cuſtom does e; and they are not bare tenants at will, but tenants at will *rdum conſuet. &c.* and while they obſerve the cuſtom, they as abſolute and as indefeaſible * an eſtate as any like tenant at mon law has. *Vide Litt ſ.* 77. 2. *Hen.* 4 *pl.* 12. where the ſtion was, whether the tenant ſhould recover in value, and not ther the action lay, for that was taken for granted in reſpect he intereſt he had in umbrage, ſhrouds, &c. Beſides, the nt has the abſolute owner ſhip of the land according to the e, and may convey and releaſe his right at pleaſure; and when ſurrenders into the hands of the lord to the uſe of another, *y que uſe* is in from the ſurrenderor, and not from the lord, is only an inſtrument, and he ſhall plead the ſurrender as a t from the ſurrenderor. So if the right of every part of the be in him, he neceſſarily muſt have a remedy for an injury to his right, for the law cannot ſuffer a right to be without a edy; and that a copyholder may cut trees to repair. 1 *Ro.* 508. 1. *Sid* 152. That copyholder may dig a mine, which cannot do, if he have not a joint intereſt with the copyholder. if the lord ejects his copyhold tenant, he ſhall have treſpaſs nſt him for it. 2. *Saund.* 422. *Noy* 14. it well lies in this caſe. *Co.* 67. 2. *Brownl.* 328. And if he may have caſe for injury him in the lord's own ſoil, as in the caſe before put of the vers, ſurely he may have treſpaſs for injury in his own ſoil. *Yel.* 104, 105.

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* [379]

hen it was added, that however it would be in caſe of a copy-er, yet it was clearly maintainable here, it being leſſee for s, who has an eſtate at common law; and it was ſaid copy-er may make a leaſe for years without any cuſtom to war-it.

OLT, *Chief Juſtice.* This being by leſſee for years, without ute will not alter the caſe, becauſe he is leſſee of a copyholder, *nemo poteſt plus juris in al' transferre quàm ipſe habet.* But o the main point, if the lord cut down ſo many trees as not to e ſufficient eſtovers, &c. the copyholder ſhall have treſpaſs, the value of the trees in damages; but if he leave ſufficient vers, then he ſhall have treſpaſs too, but ſhall only recover ial damages, *viz.* for the loſs of his umbrage, &c. breaking cloſe, treading his graſs, &c. And the tenant has the ſame omary or poſſeſſory intereſt in the trees that he has in the l; and if the lord has a mind to cut trees, his buſineſs is to pound with the tenant. 3. *Cro.* 361. that tenant may lop r-boughs, and cut for repair and bote. And 3. *Cro.* 5. is not as appears by the caſe of *Heiden v. Smith.* 13. *Co.* If

1. Cro. 377. 437. Vide 1 Cro. 221. 1. Jo. 244.

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birds build neſts in the trees, the * eggs are the tenant's. ſhews he has the poſſeſſory intereſt in the trees, though h be but for years. And whether the lord may cut trees, ſufficient eſtovers, is very gently trod on in the caſe of *E Smith*; but no copyholder can commit waſte without a

All copyholders have eſtovers of common right. Yelv. 188. Moor, 18, 19.

cuſtom, but all copyholders have eſtovers of common ri a man grant all his eſtovers, and cut down the wood any other act whereby the grantee loſes the benefit of th caſe will lie. And ſo *Yelverton* and *Golaſborough*.

Judgment was given for the plaintiff (*a*).

(*a*) It is ſaid, that THE WHOLE COURT were clearly of opinion, that judgment ought to be given for the plaintiff, becauſe it appeared that the plaintiff had not enough to repair without theſe trees, S. C. 1. Ld. Ray. 552. S. C. Fort. 154; and on the defendants bringing a writ of error in the exchequer chamber, the judgment of the court of king's bench was affirmed, S.C. 2. Salk. 638. S. C. 11. Mod. 18; but afterwards a writ of brought in Parliament, and 28th *April*, 1702, both judgm reverſed, ten lords being for and eleven for reverſing, S. Ray 552; for the tenant cou the trees; and if the lord coul nobody could, and they muſt land. S. C. 2. Salk. 638.

Caſe 633.

Carter *againſt* Palmer.

A promiſſory note payable *to bearer* was not negotiable on the cuſtom of merchants, but was evidence of money lent to the drawer.

PALMER had given *a note* under his hand in this for "PROMISE to pay *the bearer* ſo much money on de The plaintiff brings his action, grounding it upon the cu merchants, as if it were *a bill of exchange*; and avers a conſideration.

After verdict upon motion in arreſt of judgment,

HOLT, *Chief Juſtice*. We will take ſuch a note *prim* for evidence of money lent (*a*); and though they have decl the cuſtom, yet we muſt take care that by ſuch a drift the *England* be not changed by making all notes, bills of exchan

Vide ante 36.

But ALL SEEMED TO AGREE, that if it were made "to him, or order," the defendant by that form had made gotiable (*c*), and by conſequence he would be liable to the of the aſſignee in his own name; for if a man who is no m will draw a bill of exchange, he is ſuable upon it, according cuſtom of merchants, for he makes himſelf a merchant *pro hac* And inland bills were not known till trade grew to a great

(*a*) See Clarke *v.* Adair, Eſp. Dig. 26. Grant *v.* Vaughan, 3. Burr. 1516. Tatlock *v.* Harris, 3. Term Rep. 174. Kyd on Bills of Exch. 197.

(*b*) Promiſſory notes are now by 3. & 4 *Ann.* c. 9. put in every reſpect on the ſame footing as bills of exchange. See Brown *v.* Hampden, 4. T 143.

(*c*) See Pollet *v.* Pearſon, 1. and 3. & 4. *Ann* c. 9. ſ. 1. an Paine, Cases Temp. Hardw. 1

(*d*) Vide 2. Vent. 295. Steward, 1. Salk. 125.

ien they obtained, they received the ſame law with out- CARTER *againſt* PALMER.
bills.

HOLT, *Chief Juſtice*, ſaid he remembered, that at a trial
in inland bill before HALE, the defendant's Counſel would
plaintiff to prove the cuſtom; but HALE ſaid they had a
l point of it.

adjourn' (*a*).

(*a*) both bills of exchange and promiſſory notes payable *to bearer* are now tranſferable. See 3. & 4 *Ann.* c. 9. Grant *v.* Vaughan, 3. Burr. 1516. Miller *v.* Race, 1. Burr. 452.

The Duke of Ormond *againſt* Brierly. Caſe 634.

OND was taken by the bailiff of *IV.* conditioned, that if Bond to proſecute with effect, not forfeit by getting injunction.
bligor, being plaintiff in replevin, ſhould proſecute the ſuit
ffect, &c.

n *oyer*, the defendant pleads that he did declare and proſecute S. C. ante, 320.
action till ſuch a time, *prout patet per record. inde*; and that S. C. Carth. 519.
g the ſuit the defendant died, whereby it did abate by the S. C. Holt, 127.
God. 1 Ld. Ray. 278.

plaintiff replies, and confeſſes the plea; but ſays further, * [381]
e defendant ſued an *Engliſh* bill in the exchequer, and there
d an injunction to ſtay proceedings; whereby the ſuit was
l, ſo as judgment could not be had till the defendant's

upon demurrer,

WAS URGED *for the plaintiff*, that by obtaining the injunc-
e defendant had diſabled himſelf for a time to proſecute the
a time; and a temporal diſability of performing a condition
ounts to a forfeiture. *Mo.* 400.

RIA *contra*. For he cannot be ſaid not to continue the ſuit 2. Cro. 68.
ffect till nonſuit, *retraxit*, or ſome other act, by which here
nd of the ſuit. This bond is in lieu of pledges, which the
is bound to find, and take by the ſtatute of *Weſtminſter the*
(*a*); and if he failed to find pledges according to that ſtatute,
uld be liable to the avowant's damages, to be recovered by
againſt him; and where ſuch pledges would not be liable,
bligor that is in lieu of them would not be liable (*b*).

d judgment for the defendant,

(*b*) See Blackett *v.* Criſſop, 1. Ld. Raym. 278. Acton, 2. Black. 1220. Yea *v.* Lethbridge, 4. Term Rep. 433. Concannon *v.* Lethbridge, 2. H. Bl. Rep. 36. and Evans *v.* Brander, 2. H. Bl. Rep. 549.
See Prowſe *v.* Pattiſon, 7. Mod. 6. Vin. Abr. 400. Richards *v.*

Caſe 635.

Nicols *againſt* Bride Bridge.

Bond in truſt is not Aſſets. 1. Salk 79.

PER CURIAM. A man makes a bond to *A.* in truſt *A.* dies, his executor receives the money; it ſhall aſſets.

Caſe 636.

Mikes *againſt* Caly.

An *action on the caſe* lies by a maſter of a ſhip againſt the officer of a corporation for wrongfully diſtraining his cargo, whereby he loſt his voyage. S. C. Holt, 467.

IN an action on the caſe the plaintiff declared that he w ſeſſed of a ſhip ready for a voyage to *America*, lying harbour of *B.* and was ready to ſet ſail the firſt fair win the defendant entered upon his poſſeſſion, and diſtrained t with which the ſhip was freighted, whereby he loſt his to his damage, &c.

The plea was, that the ſaid *B.* is an ancient borough fo hundred years by ſuch a name, and afterwards incorpor letters patent by another name; that, time out of mind, th an ancient court in the borough for adminiſtration of juſti That the corporation, time whereof, &c. uſed to repair an

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tain the court-houſe * at their charge; and in conſideratio of they had time, &c. ſo much a ſack for all corn that wa that borough, (in the name of toll,) by any not inhabitant of the corporation. That the corn in the plaintiff's ſ bought by perſons not inhabitants, &c. and put on board paying toll: and a preſcription for diſtraining in caſe of was laid; that the defendant was bailiff appointed by the t their bailiff, by writing under their common ſeal; and u mand and refuſal diſtrained the corn for the uſe of the corp

The plea was agreed to be bad, chiefly for that it was that it was a corporation time out of mind. 1. *Inſt.* 114.

But it was argued, FIRST, That, as it was laid, the fa treſpaſs, and therefore the plaintiff had miſconceived his for general treſpaſs, and treſpaſs upon the caſe, are differen actions, grounded upon different ſpecies of offences. 4. *E* 2 *Rol. Rep.* 149. *Palmer* 47. 13. *H.* 8. 26. An actio caſe for a nuiſance for making a lime kiln, without laying upon the defendant's own ſoil, was held bad; becauſe, if it w ſoil of plaintiff, treſpaſs were the proper remedy, and n though a conſequential damage, *viz.* the loſs of water were laid. *Latch* 65. The action on the caſe was againſt for taking away goods for which toll was due, without pa whereby the goods were forfeited; and there it was qu whether that were caſe or treſpaſs, but held to be proper becauſe a ſervant who had authority (*a*). And it was

(*a*) See the caſe of Maley *v.* Gaisford, in which it is ſaid to be difficult to put a caſe where *the maſter* would be conſidered as *a treſpaſſer* for an act of his ſervant which was not done by his command: in the Common Pleas, Eaſter *Geo.* 3. 2. H. Bl. Rep. 44 Day *v* Edwards, 5. Term Savignac *v.* Roome, 6. Term

)4. does not warrant the opinions grounded upon it in 4. *Co.* ınd he quoted the caſe of *Thornton v. Auſtine* (*a*). An ın the caſe was brought for entering ino a waſte and driving whereby they were damaged; and the judgment was arreſt- that treſpaſs lay, and not caſe. The caſe of *Gill v. Darle* s an action on the caſe for cutting the plaintiff's corn; and gment was arreſted, for it ſhould have been general treſ- nd if every treſpaſs were turned to caſe, the king would fines (*c*).

MIKES *againſt* CALY.

Vide 2. Cro. 50. 123.

as further urged, that this action did not lie for the maſter: , For by the ſame reaſon it would lie for every one of the rs, for every of them too have loſt their voyage; and ſo it ikewiſe for every of the owners. SECONDLY, It were to n an action for conſequential damages, with which a ſtran- y diſpenſe: as if I covenant with *A.* to build a houſe upon und, and *B.* ouſts him; by which I am hindered of per- my covenant *, I cannot have an action on the caſe *B.* becauſe *A.* by his releaſe may make the hindrance and ſo may the owners do here; and if any damage was, ion ought to have been brought by the owner, and the have his remedy againſt him.

The *maſter* of a ſhip may bring an action on the caſe againſt a corporation for wrongfully diſtraining his cargo on pretence of non-payment of toll, whereby he loſt his voyage.

* [383]

PER CURIAM, The plaintiff had judgment.

by HOLT, *Chief Juſtice*, The maſter of a ſhip is in many ſuable, and may ſue in things concerning the ſhip, as the owner: and the defendant might have title to the by ſale, or conſignment by the owners; but that ought to ten pleaded; and what the maſter recovers in this action is uſe of the owners. The maſter may bring an action againſt rchant for freight in his own name; but *quatenus* maſter, not bring trover for the ſhip, but he may have caſe, if by re of the ſhip he be hindered of his voyage, as here; and taken from him in relation to the ſhip, he ſhall have caſe aſs for it at his election, with this difference, that if he treſpaſs he muſt declare upon his poſſeſſion; and he ſhall eſpaſs for a diſturbance of him in his office.

PER TOTAM CURIAM, Judgment was given for the P.

aſter Term, 5 *Will.* 3. entered rm, 4 *Will.* 3. Roll. 105. aſter Term, 9 *Will.* 3.

(*c*) See Pitt *v.* Gainec and Foreſight, Salk. 10. 1 Ld. Ray. 558.

Reignolds *againſt* Davis.

Caſe 637.

RRANT of attorney to confeſs judgment to *a feme ſole*, who married before judgment entered; Whether it could entered, and how? was the queſtion.

How judgment to be entered on a warrant of attorney by a *feme ſole* who afterwards marries. S. C. Salk. 399. 2. Stra. 882.

as agreed that it could not be entered for the huſband, for beyond the authority given. The courſe is, to make affi- davit

REYNOLDS *againſt* DAVIS.

davit of the debt's not being ſatisfied; and now the wife could not make ſuch affidavit, for the money might have been paid to the huſband; nor could the huſband's affidavit ſerve, becauſe it might have been paid to the wife before marriage; but *videtur* that point may be cleared by a ſeveral affidavit of each in his time.

And HOLT, *Chief Juſtice*, ſaid, they had better enter it in the wife's name as *feme ſole*; but nothing was done (*a*).

(*a*) It is ſaid, that the warrant is countermanded by the marriage. 1 Salk. 399.

Caſe 638.

The Pariſh of Spittlefields *againſt* the Pariſh of St. Andrew's.

A baſtard is ſettled where born.
S. C. 1. Ld. Ray. 567.
S. C. Fort. 307.
1. Bl. Com. 362.
2. Conſt's P. L.

IN a caſe where the controverſy was between the inhabitants of *Spittlefields* and pariſh of *St. Andrew*, it was ſaid,

PER CURIAM. That a child could not gain a ſettlement at nurſe; that a ſettlement for the father is ſo for the child; and that the place of the child's birth is the place of his ſettlement, till contrary appears.

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Caſe 639.

* Hanckford *againſt* Mead.

Miſtake of plaintiff in judgment for damages amended.
Vide Hob. 327.
1. Vent. 217.

A JUDGMENT for damages was, "*quod præd. A. recuperet*," inſtead of "*præd B.*" and it was amended on motion: And GOULD, *Juſtice*, quoted a caſe of *Cradock v. Wills*, where the like fault was amended on his motion after twenty years time; and that the caſe in *Stile* —— was then denied to be law.

(*a*)

Caſe 640.

Anonymous.

Statute.

PER CURIAM. An act of parliament's reciting *J. S.* to be heir, does not make him ſo.

Caſe 641.

Anonymous.

Adjournment.

PER CURIAM. We may adjourn a trial at bar without conſent of parties.

Caſe 642.

Stanhop *againſt* Pemperton.

Damages ſeparated in writ of enquiry.

WRIT of error of a judgment in common pleas, where the judgment was by default, and damages ſeparated by writ of enquiry.

HOLT, *Chief Juſtice*. If there be two plaintiffs, in many caſes there may be judgment for one party, and *non proſ.* entered for the other; and the judgment upon the *non proſ.* is *quod eat inde ſine*

ie; but where the *non proſ.* is only for part of the thing de- ed, it amounts to a releaſe only for ſo much. And he ſaid an ney might undertake for his client, but not releaſe his cauſe of l.

STANNOP *againſt* PEMPERTON.

Anonymous.

Caſe 643.

COVENANT was to build a houſe upon land demiſed, be- ore ſuch a day, and to keep it in repair, it was "for leſſee is aſſigns;" and after the day covenant was brought againſt ſignee for not repairing. The defendant pleads the houſe ot built before the day; and upon general demurrer, gment was given for the plaintiff. It was agreed this would ve bound aſſignee, being for a new thing, without expreſsly g him (*a*).

Covenant to build and repair, does not bind aſſignee, unleſs named, being for a new thing. Ante, 371.

SECONDLY, That the plea was a negative pregnant.

ee Spencer's caſe, 5. Co. 16. Gurcot *v.* Green, 1 Salk. 199. St. Sa- Cook, Cro. Jac. 125. Dean viour's *v.* Smith, 3. Burr. 1271. 1. Black. pter of Windſor's caſe, 5 Co. 24. Rep. 351.

Anonymous.

Caſe 644.

CURIAM. If a *certiorari* go to remove a record, the dge below is not in contempt for proceeding on the record vice of the writ, but all proceedings upon it after the *ari* teſted are void.

Certiorari ſtays proceeding from the *teſte*, but the contempt only from ſervice.

* Anonymous.

Caſe 645.

CURIAM. Payment to ſheriff upon a *capias ad ſatisfaciendum* is not good to diſcharge the plaintiff's debt; and ſo ed and ſettled in the *Sheriff of Wiltſhire's Caſe*.

Payment to ſheriff on *ca. ſa.* not good. Ante, p. 230.

Anonymous.

Caſe 646.

SEE a *poſtea* is brought into court, though the plaintiff take out again, yet it remains in poſſeſſion of the Court, and the of the Court may command the plaintiff to bring it in; e defendant may give the plaintiff notice to bring in a n order to move in arreſt of judgment.

A *poſtea* once brought in is always under the controul of the Court.

Anonymous.

Caſe 647.

CURIAM. After exception againſt bail they muſt juſtify mſelves, or plaintiff muſt withdraw his exception, before proceed to trial, ſo as to charge them.

Bail.

Siliard

Caſe 648.

Siliard *againſt* Cox.

If a man who has houſes in different dioceſes die in one, that intitles the ordinary of it to grant adminiſtration, if he has not *bona notabilia*.

AN *aſſumpſit* was brought by an adminiſtrator; a plea in bar, that the inteſtate died at ſuch a place in another dioceſe than that from whoſe ordinary the adminiſtration was committed to plaintiff, and was inhabitant there at the time of his death.

Upon demurrer,

Judgment for defendant: for if a man has two houſes in divers dioceſes, his dying in one of them without *bona notabilia* in the other, intitles the ordinary of that dioceſe to adminiſtration; otherwiſe if he were on a journey, and ſo died.

Caſe 649.

Crow *againſt* Brown.

Uſurious contract pleaded in bar of debt on a bond.

A USURIOUS contract was pleaded in bar to debt upon a bond, but it was not ſaid that the defendant was indebted to plaintiff at the time the bond was given, or that there was an agreement to lend money upon the uſurious contract; and for that judgment was given for the plaintiff.

Caſe 650.

Anonymous.

Legatee admitted to prove aſſets in the hands of executor, on a ſuit by a creditor.

PER HOLT, *Chief Juſtice*, at *niſi prius*. I have known it ruled, that a legatee ſhould not be a witneſs to prove aſſets in the hands of an executor in debt by a creditor; and it has been an old exception, but I ſee not the reaſon of it, for he ſwears to leſſen the aſſets, and one creditor may be a witneſs to prove aſſets in an action by another creditor. And the legatee was ſworn.

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Caſe 651.

Phyſician in *London* fined and impriſoned *per mandatum*, by certificate of the College of Phyſicians.

S. C. Salk. 144. 200. 253. 392.
S. C. 7. Mod. 165. 364.
S. C. Carth. 121. 491
S. C. Comy. Rep. 76.
S. C. Ray. Ent. 417.
S. C. Holt, 184. 195. 536.

* Doctor Grenville *againſt* The College of Phyſicians.

IN treſpaſs the plaintiff declared, that *J. S.* &c. did at ſuch a place, &c. aſſault, beat, and wound him, and impriſoned him for ſeven days.

To which there was this ſpecial plea: FIRST, As to the *vi et armis*, and wounding, "Not guilty." SECONDLY, As to *reſiduum tranſgreſſionum*, they pleaded the charter of incorporation of 10. *Hen.* 8. and the act of parliament of the fourteenth year of the ſame king, confirming the ſaid letters patent, by which the phyſicians of *London* were created a body politick and college, and to have four cenſors to examine phyſick within *London* and ſeven miles round it; and that thoſe cenſors ſhould be four in number, to be choſen by them yearly to have cenſure and examination of drugs and practiſers of phyſick within the diſtrict aforeſaid, and power to puniſh as charter directs at large. Then they further plead the ſtatute of *Philip* and *Mary*, by which all

aolers are commanded to receive into their cuſtody all
ners committed by them; that the plaintiff was a practiſer of
ck in *London*, and on ſuch a day and year of the king did
upon himſelf to cure the wife of *A.* for forty ſhillings to him
nd paid; that he did adminiſter ſuch unwholſome and noxious
to her, that ſhe became incurable, and ſo in manifeſt danger
er life, occaſioned by ſuch his phyſick; that the four perſons
ie declaration were duly choſen cenſors; that complaint was
: to them by *A.* the huſband for the ſaid offence; that he was
noned to appear, &c. to be examined by them ſuch a day;
he did appear, and that they proceeded to examine him; and
the teſtimony of ſeveral witneſſes, and hearing what he could
or himſelf, they the ſaid cenſors judged him guilty of the ſaid
actice, and impoſed a fine of twenty pounds upon him, and
ſonment for twelve weeks without bail or mainpriſe, unleſs
r releaſed by the maſter and preſident of the college of phy-
s: that they four did, by a precept in writing under their
and ſeals, command *J. S.* the other defendant, to take and
er him to the keeper of the gaol of *Newgate*; by force of
a warrant he the ſaid *J. S.* did ſo, and that the keeper kept
n gaol for the time in the declaration.

o this there was a replication, that the plaintiff is a phyſician,
vas ſo at the time of the ſuppoſed offence committed; and
ESTANDO * that there is no ſuch charter, and that he is not
ſkilful phyſician, and that no complaint was made by the
nd, and no judgment by the cenſors; for plea ſaith, that *de*
iâ ſuâ propriâ he made the aſſault, &c. ABSQUE HOC, that he
by virtue of the ſaid warrant.

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ad upon demurrer, *per* HOLT, *Chief Juſtice*, TURTON and
LD, *Juſtices*, after many arguments, and great conſideration,
nent was given for the defendant.

OLT, *Chief Juſtice*, delivered their opinion thus:—Though
has been ſaid to maintain the replication, yet there is no
r for it. It was objected that there was a good traverſe of
arrant, but that cannot be, for there was a warrant granted
leaded, and the plaintiff was taken by virtue of it; and he
s his being taken by virtue of it, but does not traverſe the
; of a warrant, for that had been a good traverſe. Suppoſe
as a legal and an illegal warrant, and arreſts by virtue of the
l warrant, yet he may juſtify by virtue of the legal one; for
not what he declares, but the authority which he has is his
cation. I ſuppoſe the plaintiff means by this replication,
he defendant arreſted him by virtue of ſome other authority,
ot by the warrant that is pleaded; but then his way had been
luce his traverſe by ſhewing that other authority, and then to
ſe, not as here, ABSQUE HOC, that it was by virtue of the
nt pleaded, but to ſay that the defendant arreſted him by
of the other authority, ABSQUE HOC, that he had the
warrant

If one has a legal and illegal warrant, and arreſts by the illegal one, he may juſtify by the legal one.

DOCTOR GRENVILLE *againſt* THE COLLEGE OF PHYSICIANS.

warrant pleaded at the time of the arreſt: So, inſtead of traverſing the *virtute warranti*, he ſhould have pleaded the being of the warrant at that time. 34. *Edw.* 1. *Fitz.* "*Avowry*" 332. 3. *Co.* 26. If one diſtrain for an unjuſtifiable cauſe, yet when he comes to avow, he need not inſiſt on the cauſe for which he had diſtrained, but may juſtify for any lawful cauſe, as for rent arrear, though he diſtrained for ſome other cauſe; and the cauſe, for which the diſtreſs in truth was, is not traverſable, but *riens arriere* is the proper plea.

College of Phyſicians have juriſdiction over the perſon of a phyſician as practiſer.

THE SECOND POINT was, Whether the defendants have ſufficiently invited themſelves to a juriſdiction to condemn the plaintiff? And this were a moſt material objection, if true; but it is moſt apparent they have done it by ſetting forth their charter, confirmed by act of parliament; by which they have a juriſdiction over his perſon as practiſer of phyſic, eſpecially if he practiſe ill. SECONDLY, They have juriſdiction over his practice. THIRDLY, The fact which they puniſh is within the limits of their juriſdiction, *viz.* in *London*, and * their juriſdiction extends ſeven miles round; and this juriſdiction is to be exerciſed by thoſe that are cenſors of the college, which they are ſhewed to be.

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Mala praxis is not traverſable.

THE THIRD OBJECTION is, That it is apparent this charge of mal-adminiſtration of phyſic is traverſable; and therefore ought to be ſufficiently alledged, as iſſue might be taken upon it; and for this is quoted *Dr. Bonham's Caſe*; for if it be not traverſable, the party committed would be without remedy, for writ of error lies not. But to this we anſwer, FIRST, That notwithſtanding the opinion in *Dr. Bonham's Caſe*, the matter is not traverſable. SECONDLY, That if it were traverſable, iſſue might be taken upon it here. THIRDLY, If the plea were defective in that, yet it would not intitle the plaintiff to his action. FIRST, The fact is not traverſable; and that appears from the nature of this authority; for it is an abſolute power given to them to hear and determine ſuch offences; and thence it does neceſſarily follow, that the matter is not traverſable; and he ſhall never arraign their judgment, but is finally convicted and concluded by it; and ſuch as are by law made judges of another, ſhall not be criminally accuſed, or liable to action of party for what they do as judges. 43. *Edw.* 3. 9. 9. *Edw.* 4. 3. 12. *Co.* 26. Now, that they have ſuch a judicial power by their charter is plain; for they are to examine all mal-adminiſtration of phyſick, and to give judgment thereupon; and what is that but to hear and determine? But ſome indeed have power to impriſon by law, who do not do it by way of puniſhment, but by way of prevention; as a conſtable may commit one to prevent a fray; and therefore, becauſe he does it not as judge, if he does it *malitioſe* action will lie againſt him for it; and there are other miniſterial commitments, as by juſtices of peace, commiſſioners of bankrupt, &c. for which action may lie. But in this caſe the cenſors have power to examine them for ill practice, and to convict and puniſh them for the ſame by fine and

Where power is given to hear and determine, the matter is not traverſable.

Where perſons are made judges, ſhall not be criminally accuſed, or liable to action.

Conſtable may impriſon by law to prevent affray, but therein does not act as judge; and there action may lie.

impriſonment;

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priſonment; and this makes them judges of record; for wherever ere is a power *de novo* erected by parliament to convict, and fine, and priſon, either of thoſe two make it a court of record (*a*). Leet can e, but not impriſon. 8. *Co.* 61. *Nulla cur. quæ recordum non bet, poteſt finem imponere, nec aliquem carceri mandare, quia iſta ſtant tantummodo ad curias de recordo*; therefore theſe cenſors, ving a power to fine and impriſon, of neceſſity are judges of cord, and their court is a court of record. 10. *Co.* 103. Diſ- urſe upon the ſtatute of *Weſtminſter the Second*, c. 11. concern- g auditors to account; * before that ſtatute, if one had account- before auditors, and were found in arrear, and debt were brought r the arrears, the defendant might have waged his law, but he nnot ſince the ſtatute; and why? There are no words in the atute to take away the wager of law, ſave only, that if the party e found in arrear before auditors, they ſhall commit him; but e reaſon is, that by giving the auditors power to commit by the atute, by neceſſary conſequence the auditors are made judges of cord; and therefore there ſhall be no wager of law againſt their oceedings. And if ſuch a power makes them judges of record that caſe, why not in ours? 2. *Inſt.* 280. Auditors to account e allowed to be judges of record; and this ſurely is an authority point for us. Then if the cenſors in this caſe are judges of cord, the conſequence is very ſtrong, that no act of theirs, ich they do as judges, is traverſable; and no averment receiv- e, that a judge of record has acted againſt his duty. 47. *Edw.* 3. 50. 1. *Hen.* 6. *pl.* 4. 7. *Hen.* 6. *pl.* 13. *pl.* 85. 12. *Co.* 22. *Aſſ. pl.* 18. A Judge of *oyer and terminer* was indicted, for t he being a Judge, and one being indicted before him for treſ- s, he made up the record to be for felony; and adjudged the in- tment did not lie, and it was quaſhed; and that it ſhould never averred but that it was for felony; nor could a Judge be ſup- ed guilty of ſuch an offence. And as to my LORD COKE's ing in *Doctor Bonham's Caſe*, we ſay it was but *obiter*, and not tinent to the caſe; for there the commitment was for practiſing thout licence, and not upon the clauſe now in queſtion; and re they ought to have ſued in the courts of *Weſtminſter Hall*; d not commit him; and ſo what my *Lord Coke* ſays is no judicial nion: Beſides, he ſeems to have been under ſome tranſport, cauſe *Doctor Bonham* was a graduate of *Cambridge*, his own ther univerſity. And he himſelf afterwards, in the ſame caſe, s ſay, that if the cenſors do convict a man for ſuch offence, they ght to make a record of it; and that they cannot do, unleſs y are judges of record; and then we ſay their proceedings untraverſable, and they unpuniſhable for what they do as dges.

Wherever there is power to impriſon and fine, are courts of record.

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Since by ſtatute auditors can fine, are judges of record, and therefore wager of law will not lie.

Againſt the act o. judges of record, no averment that they have acted againſt their duty.

Perſons are unpuniſhable for what they do as judges.

A FOURTH OBJECTION is, That there is another reaſon why s muſt be traverſable, becauſe the party has no other remedy;

(*a*) 8. Co. 38. Salk. 20. 3. Bl. Com. 25.

for

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for he cannot have a writ of error. To this, FIRST, we anſwer: The party is not without remedy, and that as good as a writ o error. And SECONDLY, Suppoſe he had no * remedy; yet tha would be no reaſon why he ſhould of neceſſity have leave to tra verſe. And as to THE FIRST, I agree, a writ of error does no lie; becauſe it is a new way of proceeding unknown to the com mon law, and not according to its rules. For they need not pro ceed purſuant to the methods of law, nor need they indictment o jury; nor in their judgments ſay, *ideo conſideratum eſt*; but ma ſay, they judge him guilty, and that he ought to pay ſo much mo ney, &c. And it is like the caſe of convictions by juſtices o peace; and in both caſes I hold, the party has a good remedy by *certiorari*; and that is a conſequence neceſſary on all ſuch parti- cular juriſdictions, that the record of their proceeding may be brought up hither, that this Court may examine whether they have kept themſelves within their juriſdiction. 3. *Cro.* 489. *Long's Caſe*; he was found guilty of felony, and burnt in the hand; and held a writ of error could not lie, becauſe no judg- ment of attainder, but that it might be removed by *certiorari*; and ſo it was; and, for faults in the conviction, quaſhed, and the party reſtored to his goods and chattels. We do take it, that where a court in its nature is a court of record, a *certiorari* will lie to it, by reaſon of the great ſuperiority of this Court (*a*); which may command them to ſend their proceedings before them up hither, that it may be ſeen whether they confine themſelves to their juriſdiction; which if they exceed, this Court may correct them; and how comes it to be granted upon convictions by juſ- tices of peace, or orders of commiſſioners of ſewers? I remem- ber formerly the commiſſioners of ſewers were adviſed by Counſel not to obey *certiorari's*, but they were all laid by the heels for following ſuch advice, and obliged to obtain the king's pardon for the offence. And *Mr. Callis*, upon his reading upon the ſtatute, holds, that their orders are removable hither by *certiorari*. In- deed we are ſo cautious often to deny it, leſt in the mean time the country ſhould be overflown: But the general reaſon of the law is, that wherever a juriſdiction is ſet up by act of parliament to make convictions, &c. *certiorari* will lie to remove them; as in caſe of forcible entries. And the Court is to examine, as far as appears on record, that they have not exceeded their authority; and if they have not, or not purſued the act, to quaſh the proceeding— As to THE SECOND, Suppoſe there were no remedy, it would not follow from thence that theſe proceedings are traverſable, becauſe the act has given them a power, and has given the * party no re- medy; for the not giving an appeal from them, or the making their judgments irreverſable, ſhall not alter the nature of a court of record. And if the ſtatute gives them too great a power, who can help it? That there lies no appeal is a ſtrengthening rather

* [390] Error will not lie on a new created juriſdiction, un- known to com- mon law; but may have *certiorari*. Vide ante, 146.

1. Vent. 66. Orders of Sew- ers removable *B R.* Pottea Trin. 22. *Will.* 3. Dom. Regina v. Inhabitants *de Glamorganſhire.*

* [391]

(*a*) See 1. Sra. 609. Cowp. 524. 536. Dougl. 534. 2. Black. Rep 793. 3. Hawk. P. C. 7th edit. ch.

than

a weakening of their authority. And this appears by many orities; as if a verdict be given by a jury in a criminal cauſe, f in ſuch a caſe the Judge miſdirect the jury, or tell them law is otherwiſe than it is; as that killing a man in his own nce is murder, and the jury ſhould find it ſo, there is no re- y. There has been an old ſtar-chamber law that a jury ht in ſuch caſe be attainted (*a*); and a Judge has been brought the ſtar-chamber for making a falſe return; but adjudged it d not be. And heretofore a jury has been fined for giving a lict againſt evidence. *2. Leon.* 233. *Noy*, 48. *Yelv.* 23. 130. But ſee *Buſhell's Caſe (b)*; where it was held by all Judges of *England*, except one, that a jury could not be fined giving a verdict againſt evidence, becauſe they are judges of fact; and therefore, by the ſame reaſon, the defendants here, ng judges of the matter, ſhall not be liable to action for their icial act. 3. *Cro.* 309. In a civil action, if the Judge direct the y that the law is otherwiſe than it is, and they find according directions, yet attaint lies not: Yet there the parties are hout remedy; therefore it would not follow in our caſe, be- ſe there is no other remedy, therefore the matter is traverſable; l that either in civil or criminal matter. And though the intiffs have no jury here, yet that makes no alteration; for if y have power to convict, fine and impriſon by the ſtatute, they judges of the matter. 7. *Hen.* 6. *pl.* 13. there is a diverſity ween a fine and an amerciament; if a fine be impoſed, it is not erſable, but an amerciament is. No action will lie againſt a bailiff warding a proceſs upon a preſentment. What then remains in caſe? For if, as long as the verdict of a jury ſtands, it cannot raverſed; why when the ſame authority which the jury had is ed in a Judge by act of parliament, why, I ſay, ſhall it be tra- able? and can any man give a reaſon of a diverſity between caſes? for if the parliament has given the cenſors the power jury, they muſt give the conſequences of that power. And caſe of *Hammond v. Howell (c)*, in this court, in the twenty- h year of *Charles the Second*, is as full as can be in point: An ctment was found againſt ſome perſons for going to * conven- s, and the jury would not find them guilty upon evidence; reupon they were fined and committed; and upon a *habeas us* to the common pleas, it was reſolved the jury could not be d for not going according to evidence, and they were diſcharg-

Jury cannot be fined for verdict againſt evidence.

Vide 3. Inſt. 63.

If eccleſiaſtical commiſſioner commit a man againſt law, action will lie againſt him.

Fine and amerciament diffe- rent.

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And then they brought an action of falſe impriſonment againſt *well*, who pleaded, that he was a Judge of *oyer* and *terminer*, and held no action would lie, becauſe it did appear he was a ge of record; though it was plain, by the opinion of the court ommon pleas, he could not fine them by law; yet for this very on judgment was given for the defendant; and where is the erſity between that caſe and ours? They were both Judges of

Action brought againſt a Judge of *oyer* and *terminer* would not lie.

Poſtea, Trin. 12. *Will.* 3. Rook *v.* Sheriff of Salſbury.

(*a*) Vide Floyd *v.* Barker, 12. Co. 24. (*c*) 1. Mod. 119. 184. 2. Mod. 218.
(*b*) Vaugh. 135.

Doctor Grenville *againſt* The College of Physicians.

record, both had power to fine and commit, and ſhall the one be puniſhed and not the other, though they act againſt law? And as I have ſaid before, the cenſors have power over the plaintiff's perſon, and why ſhall not judges created by act of parliament, have the ſame protection as any other Judges whatſoever? I might have enlarged much more upon this head, but fear I have been too long already; and perhaps I may be ſorry to have occaſion to ſay ſo much, for ſome may abuſe it.

Action againſt commiſſioners of exciſe, for making one pay duty for ſtrong waters for what wa. not, laid, becauſe exceeded their duty. Poſtea, Trin 12. *Will.* 3 Dom. R *v.* Inhabitants *de Glamorgan-ſhire.*

THE FIFTH OBJECTION. *Hard.* 480. Treſpaſs was brought againſt the commiſſioners of exciſe, who convicted one for not paying duties for ſtrong waters; and the jury found, that the liquor was low waters from which the ſpirits were extracted, and it was held the action did lie; and what was the reaſon? Becauſe they exceeded their duty; for their authority only extended to take exciſe of exciſable liquors; but here the College have a juriſdiction over the perſon. And in caſe a juſtice of peace convicts one for having a baſtard child; and if ſo be the child be a baſtard, he is concluded, but if it be not, it is not his calling him one will make him ſo; and therefore the party is not without remedy, for all was *coram non judice*; ſo it is not the commiſſioners of exciſe's calling "low waters" "ſpirits," will make them ſo: and this is the reaſon of that judgment; for if it were admitted that they had juriſdiction, there would be no remedy. SECONDLY, And ſuppoſe it were traverſable, it is certainly enough alledged here, ſo that iſſue may be taken upon it; for it is ſaid, he took upon himſelf to adminiſter phyſic to the woman, and he gave her very hurtful and unwholeſome phyſic, whereby ſhe became worſe and worſe, and incurable.

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* THE SIXTH OBJECTION is, That it does not appear what ſort of phyſic it was. And what then? If they had mentioned it, would we be anything the wiſer for it? for we muſt try it at laſt by a jury, and take the opinion of phyſicians in it; and if an action be brought againſt a phyſician, or againſt a ſurgeon, it will be enough to ſay, that he unſkilfully and inartificially did apply his cure; and the reſt may come in evidence.

THE SEVENTH OBJECTION is, That it is not ſaid what diſeaſe ſhe had. Suppoſe ſhe had none at all, that would make the matter worſe.

Per Holt: It ſeems cenſors may tender oath, in conſequence of their juriſdiction.

THE EIGHTH OBJECTION is, That it does not appear the witneſſes were ſworn. I ſhall anſwer, FIRST, It may be a queſtion, Whether they ought to be ſworn? And it ſeems to me, they may tender an oath, as a neceſſary conſequence of their judicial power; but I will give no poſitive opinion. SECONDLY, Suppoſe they could adminiſter an oath, and will not do it, or *vice verſâ*, it would only make their proceedings erroneous, and then ought not to be arraigned for it. And though the plaintiff be not one of the College, yet, if he practiſe phyſic within their juriſdiction, he ought to ſubject himſelf to the law, as well as any other.

Though practitioner be not a phyſician, practiſing makes him liable.

And judgment was given for the defendant.

The

The King *againſt* Somerton. Caſe 652.

N ORDER OF ADJUDICATION of the reputed father of a baſtard was ruled bad for two faults:

One juſtice muſt be of the *quorum*.

IRST, It did not appear that one of them was of the *quo-* *(a)*.

ECONDLY, Nor that the examination was by them both (*b*); either held fatal.

Both juſtices muſt be preſent at the examination of a pauper.

ut becauſe the defendant was not preſent in court, as he ought e, it was only quaſhed, *niſi*.

Reputed father muſt be preſent.

6. Mod. 180. 2. Salk. 475. 1. Bl. Rep. 198.

) But now by 26. *Geo.* 2. c. 27. no ſhall be quaſhed for this exception.
) P. poſt. 419.
) See *accord.* Anonymous, poſt. 403. v. Wykes, 2. Stra. 1092. Rex v. 2. Salk. 488. Rex v. Coln St. Aldwins, Burr. S. C. 136. Rex v. Howarth, 2. Conſt P. L. 769. Rex v. Weſt, 6. Mod. 180. Billing v. Prince, 2. Black. Rep. 1017. Rex v. Forreſt, 3. Term Rep 38. and Rex v. Statſold, 4. Term Rep. 596.

Anonymous. Caſe 653.

DGMENT was upon the return of two *nihils* to a *ſcire acias*, reciting a judgment in *the King's* time, when in truth is a judgment of the time of *the King and Queen*, and ſo no ment to warrant the *ſcire facias*, and money levied by virtue is judgment.

A *ſcire facias* reciting a judgment obtained in the reign of one king, as in the reign of another, is bad.

IR CURIAM. In ſtrictneſs the defendant ought to be put to *editâ querelâ*; but we do often give relief upon motion.

nd the judgment on *ſcire facias* was ſet aſide, and reſtitution ded.

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* ——— *againſt* Cutts. Caſe 654.

TRIAL AT BAR was to be concerning the right of members of a corporation; and it was moved on one ſide, that the clerk ſhould attend with the corporation-charter.

On the trial of a corporate right, the other party may have an inſpection of the charter.

IR CURIAM. Of right you are not intitled to that, becauſe may have a copy of it AT THE ROLLS (*a*). But it being merely the right, it was thought hard to put them to the charge; he clerk was ordered to attend at the charge of them that the motion. If tenant claim by copy, the lord, on motion,

(*a*) See poſt. Anonymous, 414.

——— *againſt* CUTTS.

is only ordered to let him have ſight of the court-rolls, bring them into court (*a*).

(*a*) See Crew *qui tam* v. Saunders, 2. Stra. 1005. Slade v. Walter, 12. Vin. Abr. 146. Geary v. Hopkin, 2. Ld. Ray 851. 7. Mod. 127. Richards v. Patterſon, Comy R.p. 555. Rex v. Hollaller, B. R H. 245. Warrener v. Giles, 2. Stra. 954. Young v. Lynch, 1. Black. Rep. 27. Addington v. Clode, 2. Black. Rep. 1030. Foſ net, 2. Black. Rep. 105 Shelley, 3. Term Rep. 14 further on this ſubject Mr. t the caſe of Rex v. The Hoſtmen in Newcaſtle, 2. where all the caſes are colle

Caſe 655.

Freeman *againſt* Bluet.

An immediate officer of a court cannot juſtify under a returnable proceſs without ſhewing a warrant of ſuch who act under him.

S. C. 1. Ld. Ray. 632.
S. C. 1. Salk. 409.
S. C. 3. Salk. 220.
S. C. Holt, 408.
Lane, 52.
Moor, 57.
Latch, 223.
Cro. Eliz. 17.
Cro. Car. 447.
Salk. 408.
Stra. 1164.
Comp. 13.
2. Wilſ. 5.

TRESPASS for entering into the plaintiff's houſe, a away ſuch and ſuch his goods.

The defendant pleads, that *London* is an ancient city, that time out of mind there was a court of record there *alterutro* of the ſheriffs, which had a juriſdiction of all replevins, &c. ariſing within the city; that before the t tioned in the declaration, *viz.* ſuch a day, &c. *A.* came court, &c. and there before the ſheriff levied a plaint in taking and detaining goods, againſt the plaintiff, and ſo rity to proſecute it, and re-deliver the goods if judgme go againſt him; that *ſuperinde* the ſheriff, *ad tunc et ibid* ſue a precept to the defendant, one of THE SERJEANTS to the ſaid court, commanding him to replevy the ſaid g make a return to the ſaid precept; that he accordingly d them, &c. and delivered them to *A. quæ eſt eadem tranſg*

To which plea the plaintiff demurs.

IT WAS ARGUED *for the demurrer* the plea was n want of a return according to the command of the pre whoever juſtifies by a writ or precept, muſt ſhew his c with all its commands, without which he cannot take adv it (*a*). If an officer take the goods of an outlawed perſon, no return, the party, upon reverſal of the outlawry, ſhall paſs againſt him for his goods (*b*); for he was to have things, one for the advantage of the plaintiff, * and the that of the defendant; and he ſhall not juſtify the one wi other. And here the plaintiff ought to have the advanta return, which the defendant deprives him of by making is true, in an eſcape the defendant ſhall not take advanta want of a return, becauſe his own wrong: And one that der the officer in this caſe ſhall juſtify without a return, was not in his power to make one: But here it is the offi ſelf, who could and ought to make a return, that woul without it: and an eſcape would lie againſt this ſerjeant

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(*a*) See Year Book 20. *Hen.* 7. pl. 13. (*b*) Year Book 21. *Hen.* 7

of a proceſs of that court; but if it were upon the execu- FREEMAN *againſt* BLUET.
a *latitat*, or other proceſs out of the courts of *Weſtmin-* would not lie againſt him, but againſt the ſheriff. 1. *Roll.* 6.

N there is no ſuch court as they have ſet forth, for they ſay ourt held *coram alterutro* of the ſheriffs; and the truth is, ve two diſtinct courts, and one of them cannot act in the f the other; but as to the courts of *Weſtminſter*, they both ut one officer. *Trinity Term*, in the ſecond year of *Wil-* Vide ante, 127.
d Mary, eſcape lay againſt them both for an eſcape out of acc.
OMPTER, of which they both make but one keeper. And ing Judges does not hinder their being keeper too; as the of many corporations are both. *Roy.* 83.

, *on the other ſide.* A ſerjeant at mace is but an under- and ſuch is not liable to an action for what he does by warrant urt. Debt was upon a judgment, and pleaded that the F ſued out a *fieri facias* upon that judgment, and the money ied by virtue thereof, and paid to the plaintiff; and there it d at the Bar, that it was no plea, without ſhewing a return, the judgment being matter of record ought not to be l but by matter of as high a nature; but the ourt gave no n (*a*). The ſheriff is not excuſable by virtue of a *fieri fa-* ithout a return (*b*), for that commands him to have the in court; but he may juſtify by virtue of an *elegit* without n: *Quod* HOLT *negavit*. The party has no injury done r want of a return; for if the plaintiff in the replevin diſ- ue, he has his goods again: and for precedents of juſtifi- in replevin without a return, he cited the *Old Ent.* 136. 63. *Raſt.* 688. 669. *Co. Ent.* 333. and he put this di- , that where the command of the writ is to deliver to the hat ſues it, there needs no return; otherwiſe * where it is * [396]
e it in court; and the ſheriff without a *venditioni exponas* ll upon a *fieri facias.*

LT, *Chief Juſtice.* Till proceſs returned, the eſcape of a r in that court would lie againſt THE SERJEANT, but after it lies againſt the ſheriff. And as to the objection, that the is laid to be held *coram alterutro*, that may be well, and ſeverally, and I believe originally they were one joint court, ered by partition, and THE HUSTINGS in truth is the county of the city: and wherever the ſheriff juſtifies by virtue of a proceſs, he ought to ſhew a return. There is a diverſity in ſe in the Year-Book of *Henry the Seventh* before put; when eriff is by the writ commanded to have the party in court, ne ought to make a return, but he need not do it in judicial s, for then he is only to keep him until he makes ſatisfac-

(*a*) Year Book 11. *Hen.* 4. pl. 58. (*b*) *Vide* 4. *Edw.* 3. pl. 8.

FREEMAN *againſt* BLUET.

And PER TOTAM CURIAM in *Hilary Term* following: The plea is clearly bad, for want of ſhewing a return (*a*), for the precept is returnable, and commands a return; and in all *copias's ad reſpondend.* or other meſne proceſs to the ſheriff, if treſpaſs or falſe impriſonment be brought againſt him for executing them, he cannot juſtify without ſhewing a return: The diverſity is between the immediate officer of a court to whom the writ or mandate is directed, and one that acts under him; for if he be no officer of the court, but acts under him, he may juſtify without ſhewing a return (*b*); otherwiſe of ſheriff or other immediate officer; for he, that has not ſhewed to the Court that he has done his duty in what the proceſs of the court required him, ſhall not be juſtified by the proceſs. *Vide* 38. *Hen.* 6. and many other Books. And the caſe of replevin is much ſtronger; for where a plaint is levied in replevin, there is a precept made thereupon to replevy the goods; and if they be replevied, what ſhall the defendant do if there be not a return? It is true, he has a day on the roll to appear, and perhaps demand the plaintiff; yet if he do not appear on the return of the precept, whether the replevin be good or not, the Court cannot know what judgment or proceſs to award; whereas if return be made, and a particular of the goods given, and the defendant comes and makes title, he ſhall demand the plaintiff, and have judgment *de returno habendo*; but if the replevin be adjudged good, the plaintiff ſhall have judgment and coſts; or if the return be an *elongat.* the Court ſhall award a *withernam*; or if the party be nonſuit, there ſhall likewiſe be a *returno habend.* If the * replevin be executed and juſtifiable, judgment ſhall be for the plaintiff; and in order to theſe things there muſt be a return. The firſt replevin and *alias* indeed are not returnable, but are warrants to the ſheriff to replevy, and in nature of a *juſticies*; and therefore one may juſtify by virtue of them without a return. But the *pluries* is returnable, and therefore, if the ſheriff will juſtify by it, he ought to return; otherwiſe one ſhould have no means to have his goods again; and all the caſes that ſeem againſt this are of inferior officers. And in caſe of original replevin to ſheriffs, which is not returnable, but a *juſticies*, the ſheriff's precept to his bailiff to ſummon in the defendant is returnable, and gives them day in court.

1. Cro. 446, 447. 1. Jo. 378, 379.

Poſtea Mich. 12. *Will.* 3. Meor *v.* Watts.

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Replevin and *alias* is not returnable, but the *pluries* is.

And ſo by THE COURT judgment was given for the plaintiff.

(*a*) Same point Cotes *v.* Mitchel, 3. Lev. 20. Bratton *v.* Cole, Salk. 408. Middleton *v.* Price, 2. Stra. 1184. 1. Will. 17.

(*b*) See Bull. N. P. 23.

Caſe 656.

——— *againſt* Farrell.

In trover the thing itſelf may be brought in. Ante, 90. 95. 187, 188. 241.

RODERICK moved, that the defendant in trover after declaration might bring the thing itſelf and deliver it to the plaintiff.

And

GOULD, *Juſtice*, ſaid, he had known it often done; other- ——— *againſt* FARRELL.
here he would tender *the value*, for the defendant ſhall not
lue upon the plaintiff's goods.

the motion was granted (*a*).

ee Cooke *v.* Holgate, Barnes, Prince, 3. Burr. 1363. Whitten *v.*
oydon *v.* Batty, Barnes, 284. Fuller, 2. Black. Rep. 902.
cus, 1. Stra. 142. Fiſher *v.*

Anonymous. Caſe 657.

T, *Chief Juſtice*. If *a penſion* be by preſcription out of rectory impropriate, though the rectory come into lay hands, nay be ſued in the ſpiritual court, becauſe it might have nced by a ſpiritual act (*a*); and if ſuch a preſcription be it ſhall be tried there; but if a *modus decimandi* be plead- hall be tried at common law; and if it be not found, a con- n ſhall go. *Penſion* may be ſued for in the ſpiritual court, Poſt. 404.

, 260. 326. Stone *v.* Jones, poſt. 404. Johnſton *v.* Ryſon, poſt. 416.

Anonymous. Caſe 658.

T, *Chief Juſtice*. FIRST, If a diſtreſs for *damage feaſant* die the pound or eſcape, the party ſhall not retake them; but ere for *rent*, in either caſe he may diſtrain *de novo*. If diſtreſs *for rent* eſcape or die, diſtreſs may be *de novo*; *aliter* if for *damage feaſant*.

NDLY, Eſcape of cattle out of a pound is not like the of a priſoner out of gaol; for if the pound be not good, the ant may be his own keeper, and put them in his own pound, cannot be keeper of his priſoner. Diſtrainor may keep the diſtreſs.

RDLY, Every pound-keeper is the ſervant of him who im- the cattle, *pro hac vice*. Pound keeper.

* [398]

* Anonymous. Caſe 659.

T, *Chief Juſtice*. It is a great miſdemeanor in an attor- y to take a warrant of attorney to enter judgment on a ithout a defeaſance; and none but a ſworn attorney can h a warrant. Warrant of attorney to confeſs judgment.

The King *againſt* The Inhabitants of Kirford. Caſe 660.

RDER of two juſtices was to remove a man, with his wife d family, and it was quaſhed *in toto*, becauſe the family ave another ſettlement; ſo it would be if the order were to him and children (*a*). Order to remove a man and his family, ill.

Rex *v.* Chicheſter, 2. Seſſ. Sett. & Rem. 45. Rex *v.* Johnſton,
Chewton *v.* Compton Mar- 2. Salk 485. 2. Conſt. 773. Hobey
a. 471. Reg. *v.* Newington, *v.* Kingſbury, 1. Stra. 527.

Caſe 661.

Anonymous.

Information for making a wharf contrary to a private act of parliament.

AN ACT OF PARLIAMENT was for making a river in *Dorſhire* navigable, and that none ſhould build any wharfs upon it from henceforth; and one having afterwards built a wharf, another, who had a former, and prejudice in the advantage thereof by the ſecond wharf, moved for leave to file an information (*a*) againſt him upon the ſtatute.

And though THE COURT ſaid it was not an act of ſo public a nature, as that the Court ought, *ex officio*, to take notice of it; yet becauſe it was for public good, and the matter directly againſt it, they gave leave to file an information; but they held that an information would not lie for the violation of a private ſtatute.

(*a*) NOTE, At common law informations might be filed without motion, in the name of the Maſter of the Crown-office; but ſince the ſtatute of 4. & 5. *Will. & Mary*, c. 18. it cannot be without leave of the Court; and that to avoid frivolous and vexatious matters; and that the party, in caſe of acquittal or nonſuit, have coſts.—NOTE *a ſecond edition.*

Caſe 662.

Badger *againſt* Floid.

Perſon who has judgment in ejectment may bring debt for rent, notwithſtanding writ of error pending.

S. C. Holt, 159.

THE PLAINTIFF had judgment in ejectment, of which error being brought, and bail given to proſecute, and anſwer the mean profits; and pending it, the plaintiff brought debt for rent.

And PER CURIAM, The writ of error does not hinder the plaintiff from bringing debt, or diſtraining for his rent; and here he might have entered without a writ of execution, and only all executions by writ are ſuſpended by the writ of error: and in a real action, after judgment, the plaintiff may enter notwithſtanding the writ of error, if his entry were lawful without the judgment; for that is not by force of the judgment, which ſhall not put him * in a worſe condition than he was in before. And whereas it was urged, that in the exchequer they had laid a plaintiff by the heels for ſuch a thing, HOLT, *Chief Juſtice*, ſaid it muſt have been by virtue of their equitable power, which this Court had not.

* [399]

Caſe 663.

Anonymous.

Covenant to convey all his right; no plea to ſay he had none.

1. Saund. 216. Poſtea, Mich. 12. *Will.* Hammond *v.* Ouden.

HOLT, *Chief Juſtice*. If *A.* covenant with *B.* to convey him all his right and title to the manor of *D.* to which *A.* has no right; it is not a good plea in an action of covenant, that he had no right, &c. but he muſt make ſuch a conveyance, as would in truth paſs all his title, in caſe he had any; and he is eſtopped by his covenant to ſay he had no title.

Baſſ

Baſſe *againſt* Bellamount. Caſe 664.

Chief Juſtice. If the king grant a tract of land in the tions abroad to a man, with a legiſlative power, which : paſſes over to another, the legiſlative power ſhall not rivilege annexed to the land, but that remains with the he grantor.

Grant of legiſlative power not transferrable.

S. C. Holt, 332.

Roſiere *againſt* Sawkins. Caſe 665.

ASS by a maſter for the battery of the ſervant, *per ſervitium, &c.* The defendant pleads *actio non*, be- l not appear that he was his ſervant at the time of the nmitted, concluding with a *petit judic. de billâ, et quòd ar.*

Billa and *narratio* are the ſame in *B. R.*

S. C. poſt. 434.

S. C. Holt, 460.

Whether this were made a plea in abatement by the con- was the queſtion.

Chief Juſtice. We muſt diſcourage theſe ſort of pleas, nd *nar.* are the ſame thing in this court; and therefore emand judgment *de billa*, and alledge inſufficiency in the ; and though ſuch a plea as this ought not to be re- t ſince it has been received, there is no harm to award *s ouſter*, for the defendant cannot aſſign it for error, be- is advantage; and yet we may juſtify to give final judg- d ſo was the rule.

5. Co. 39. b. 8. Co. 59. a. Owen, 33. 7. Co. 4. 2 Saund. 46, 47. Dy. 38.

Anonymous. Caſe 666.

ACTION not to be laid anywhere but where it did ariſe, ut conſent of the parties. PER CURIAM.

Local action to be laid where ariſe.

* [400]

* Lady Faulkland *againſt* Stanion. Caſe 667.

UPON A BOND, it was pleaded in bar, that in a former upon that bond the defendant had pleaded the late ſtatute ng laying taxes upon bonds for ſecurity of money, and ſhould recover ſuch debts if they had not taxed the ſame; upon that plea the plaintiff was barred.

objected, that the ſtatute was only a temporary law, and red; and therefore the impediment being removed, the hould recover; and compared it to the caſe of excom- nt pleaded, where the judgment is *remaneat loquela ſine que, &c.* which is but a temporary plea, by which the e put out of court, but may be brought in by a re-ſum- re-attachment; but where outlawry is pleaded in abate- pardon or reverſal thereof, the party muſt begin *de novo.*

If a ſtatute enact that no bonds *unſtamped* ſhall be recoverable at law, and after the ſtatute is expired an action be brought on an unſtamped bond, made while the ſtatute was in force, the defendant may plead the ſtatute, though expired, in bar of ſuch action.

But

LADY FAULKLAND *againſt* STANION.

But by HOLT, *Chief Juſtice*, Here the defendant had a good plea when the firſt action commenced, and time ſhall not wear it out; and he ſaid, that *Co. Lit.* 178. *b.* and 135. *b.* is to be underſtood upon this diverſity, when the cauſe of action accrues to the plaintiff at a time at which he is under the diſability of an outlawry; there the plea of outlawry in abatement ſhall quite overthrow the writ, and after removal thereof he muſt begin *de novo*; but where the diſability of outlawry comes after the cauſe of action accrued, there the plea of outlawry is only a temporary diſability which does not abate the writ, but is only *quoad ſpes*; and after removal thereof, he may re-continue the action by reſummons, &c.

Caſe 668. Steer *againſt* Shalecroft.

Covenant to convey at charge of covenantee, he muſt tender the charge.

S. C. Holt, 177.

IT was COVENANT for not conveying an eſtate purſuant to articles.

HOLT, *Chief Juſtice.* There is a manifeſt difference between a covenant to make a conveyance at the charge of the covenantee, and a covenant to convey to the covenantee, and he covenants to be at the charge of it; for in the firſt caſe the covenantor is not obliged to perform the tender of the charges; but in the ſecond he is to convey at his peril; and if the covenantee will not pay, he has his remedy againſt him upon his covenant; but where the covenant is to make the conveyance at the charge of the covenantee, the covenantor ought to * give notice to the covenantee, what ſort of conveyance he intends to make, that the covenantee may judge what charge to tender.

* [401]

Deed muſt be pleaded according to its legal effect.

SECONDLY, When one pleads a deed, he muſt plead it according to its legal operation, and not according to the words thereof.

Difference between a covenant to be performed *before* and on ſuch a day.

THIRDLY, If a covenant be to make a feoffment, &c. *before ſuch a day*, the covenantor ought to give notice when he will make it, that the covenantee may be there to receive it; *ſecus*, if it be to make a feoffment *on a day certain*; but in that caſe the covenantor muſt plead a tender on the laſt convenient time of that day.

Caſe 669. Anonymous.

How ſeats in the church are determinable.

Godb. 220.

2. Bulſt. 150. 2. Lev. 193. 241. 2. Roll. Abr. 288. 3. Inſt. 202. Cro. Jac. 366. 1. Sid. 3. 3. Lev. 73. 1. Will. 326. 1. Term Rep. 428.

PER CURIAM. All controverſies concerning ſeats in a church are determinable before THE ORDINARY, except where one claims a ſeat by preſcription.

The

The King *againſt* The Vill of Abingdon. Caſe 670.

)LT, *Chief Juſtice.* The reaſon why a return to a *manda-* Return to a
mus requires the utmoſt certainty the law allows of, is not *mandamus* re-
that the party may have ſufficient to ground his action upon, if quires the great-
but to the end the Court may know what judgment to give eſt certainty.
it, in caſe it were demurred upon, and becauſe it cannot be S. C. ante, 308.
d by pleading. S. C. Salk. 431. 699.

arth. 499. S. C. 1. Ld. Ray. 559. Stra. 55. 640. 1112. Com. Dig. "Mandamus" (D. 5.).

The Biſhop of Bath *againſt* Bridges. Caſe 671.

was moved to change *the venue* in an action of *ſcandalum mag-* Special cauſe is
tum; but it was denied; for PER CURIAM, It is never required to
ed but for extraordinary cauſe, as was that of my *Lord* change the venue
ſbury (a). in *ſcan. mag.*

haftſbury *v.* Craddock, 2. Jones, 2. Stra. 807. 1. Bar. K. B. 68. Lord
. Vent. 363. Skin. 40. 2. Show. Griffin *v.* Buckly, Barnes, 482. Gilb.
Duke of Norfolk *v.* Alderton, C. P. 90. Duke of Richmond *v.* Coſ-
68. Ante, 121. Rex *v.* Lee, tello, 12. Mod. 234.
4. Lady Falconbridge *v.* Forreſt,

Anonymous. Caſe 672.

LT, *Chief Juſtice.* If upon a general releaſe, the releaſee A releaſe does
give the releaſor a bill of exchange, note, &c. bearing even not diſcharge a
with the releaſe, the releaſe ſhall not diſcharge them. *note* given the ſame day.

TRINITY TERM,

The Twelfth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Caſe 673.

* Jenning's Caſe.

Alderman may ſurrender by parol.
S. C. 5. Mod. 421
Hard. 476.
Dyer, 195.

IN *Sir Jonathan Jennings' Caſe* it was held PER CURIAM, that an alderman might ſurrender his office by parol; for ſince he may acquire that office without deed, *viz.* by election, *naturâ rei* he may ſurrender it without deed; for whatever may be acquired without deed may be ſurrendered without it. 1 Inſt. 338. *a.* And it is incident to all corporations to be able to receive ſuch ſurrender. And this judgment was upon return of a *mandamus*.

MULSO moved for a new writ, in order to bring ſurrender on in queſtion, the firſt writ being quaſhed as ill directed; and it turned it with difficulty to try the right.

Caſe 674.

Grabborn *againſt* Railer.

Warrant of attorney to confeſs judgment executor; and being entered generally ſeveral Terms ago was now amended according to the warrant.

WARRANT OF ATTORNEY was for confeſſing judgment executor; and being entered generally ſeveral Terms ago was now amended according to the warrant.

ıe King *againſt* The Inhabitants of Marlborough. Caſe 675.

RTIORARI was to the juſtices at ſeſſions to ſend up what orders they had before them; and hereupon an order of two es for the removal of a ſervant-maid, who was got with child n the year in her ſervice, was certified, without ſhewing how ne there.

Two juſtices, when they make an order, ought to certify it to the ſeſſions. S. P. ante, 376.

id PER CURIAM, FIRST, The order is well removed; for two juſtices make an order, it is very proper for them to cer- to the ſeſſions, and when they do ſo the ſeſſions are legally led *of it, and it may be well removed from thence hither *(a)*. * [403]

CONDLY, If one hire a maid for a year, and before the year's ıe is got with child, ſhe ſhall not for that be removed, but erve out her time (*b*); there ſhall be a year's continual ſer- o make a legal ſettlement for the charging of a pariſh; but e year be out none ſhall diſturb the party from ſerving. And ſhe is not removable within the year, if ſhe leave her maſter ıut his conſent, ſhe may be ſent back to her ſervice; but then o ſerve her time, but not a charge to the pariſh *(c)*.

A ſervant-maid may be removed from her ſervice on account of being with child. S. C. Comb. 354. S. C. 1. Seſſ. Caſes. 2, 8. S. C. Conſt. P. L.

See ſame point Ovencet v. Grinute, 376.
But it is now determined, that a may diſcharge a ſervant for this See Shaw's Pariſh Laws, 3d edit. . ſ. 22. 2. vol. Conſt's Bott, ons; and Rex v. The Inhabitants npton, Cald. 11.

(c) See Rex v. Iſlip, 1. Stra 423. Rex v. Eaſtland, 1. Stra. 526. Rex v. Seaford, 2. Stra. 1022. Rex v. Bampton, Cald. 11. Rex v. Watford, Cald. 57. Rex v. Weſtmeon, Cald. 129. and 2. Conſt P. L. 525. 527. Rex v. Greſham, 1. Term Rep. 101. Rex v. Kenilworth, 2. Term Rep. 598.

Anonymous. Caſe 676.

)LT, *Chief Juſtice*. Upon complaint made to one juſtice of one being likely to become chargeable to a pariſh, they both examine and order jointly; but they both muſt join in the ination and order, and one muſt not pin his faith upon the 's ſleeve (*a*).

Both juſtices muſt examine.

(*a*) See Rex v. Sommerton, ante, 393. and the caſes there cited.

King *againſt* The Inhabitants of Glamorganſhire. Caſe 677.

N ORDER OF SESSIONS was made for aſſeſſing the inhabitants of *Glamorganſhire* for the repair of a bridge in that county, ıant to the ſtatute of 23. *Eliz.* c. . which was ſaid to be a ıte law; and therefore the order being removed up by *certio-*

Order of ſeſſions for aſſeſſing to repair a bridge purſuant to a private act of parliament, removed by *certiorari*.

was moved they ſhould not be filed, for that, as it was ſaid, a *rari* did not lie, being a private law; and for this was quoted *d.* 296. 1. *Keb.* 818. 2. *Keb.* 43. 88. 90. Stra. 500.

But

THE KING *against* THE INHABITANTS OF GLAMORGANSHIRE.

But PER CURIAM, Wherever there is a particular jurisdiction set up by act of parliament, this Court may command the execution thereof by *mandamus*, and remove their proceedings hither by *certiorari*, to see whether they have observed their authority. Indeed we do not easily grant a *certiorari* in case of commissioners of sewers, for the danger that may befall the country in the interim (*a*), yet if good reason appear we will grant it; and the reason of 1. *Sid.* 296. is not because it was a private act of parliament.

GOULD, *Justice*, remembered a case where a *certiorari* was denied to remove orders of commissioners of sewers upon this reason, that if the order was wrong the party grieved had his action, and if it was right it ought not to be stopped or delayed; and that was the reason that it has been sometimes denied in case of orders of justices upon an authority by a private act of parliament.

Vide Hard. 480. Ante, 392.

To which HOLT, *Chief Justice*, answered, If they meddle with a thing out of their jurisdiction, you say well; otherwise it is when they have conusance of the subject-matter, but * do not pursue their authority. And we often stay the filing of such order, to the intent that if it be not well removed, to grant a *procedendo*; but if it appear well removed and faulty, we file and quash it. And PER IPSUM, There may be a diversity between a private act concerning one single person, and an act concerning the inhabitants of a whole county (*b*).

* [404]

Ante, 216.

And it was ruled that they should make a return, and recite the statute in it (*c*).

(*a*) Vide ante, 390.

(*b*) See Rex v. Hamworth, 2. Stra. 1160.

(*c*) This case was determined before the judgment was given in the case of Dr. Grenville v. The College of Physicians, ante, 386.—NOTE *to the fourth edition.*

Case 678.

Anonymous.

Heir by bond is only chargeable as terre tenant.

HOLT, *Chief Justice*. If one bind himself and his heirs, the heir's lands are chargeable as he is terre-tenant, and not as heir.

Case 679.

Anonymous.

A writ must issue to warrant a voluntary appearance.

HOLT, *Chief Justice*. By the antient rule of the court, there could not be a voluntary appearance without a writ were taken out; but even now there must be a writ taken out before or after; for without a writ the parties have no day in court, without which they cannot appear.

Voluntary appearance and on *capi corpus* the same.

Ante, 372.

And he saw no difference between a voluntary appearance and one upon a *capi corpus*; for surely the plaintiff ought not to be put in a worse condition for his kindness in not arresting the defendant. If a writ be returnable *crast. Animar.* and a voluntary appearance to it, it will be the same as if it were upon a *capi corpus*.

Stone

Stone *againſt* Jones.

Caſe 680.

BEL was in the ſpiritual court, ſetting forth a preſcription for the vicar of the pariſh of *Marcham* to find a perſon to officiate e chapel of *Garworth*, an antient chapel within the ſaid pariſh, ie eaſe of the pariſhioners; in conſideration whereof the pa- hers, time, &c. paid him and his predeceſſors two quarters of it, and two of malt, yearly.

The ſpiritual court may try a preſcription for the vicar to find a curate for a chapel of eaſe, in conſideration whereof the pariſhioners are to pay him ſo much yearly. *Quære.*

pon ſuggeſtion of no ſuch preſcription, prohibition was moved

nd IT WAS AGREED BY ALL, that the thing's being by pre- tion, which properly is triable at common law, did not always e to ouſt the ſpiritual court of juriſdiction; as if a penſion be reſcription, though one may bring annuity for it at common yet they may libel for it in the ſpiritual court upon the pre- tion; as *F. N. B.* 51. (*a*).

S. C. Holt, 595. Ante, 397. 2. Stra. 879. 1. Bar. K. B. 391.

it IT WAS URGED *for the prohibition*, FIRST, That of com- right the vicar is not bound to officiate out of the pariſh- ch, and therefore * not to be without preſcription. SECONDLY, es not require the vicar to officiate there himſelf, but to find o do it, which he cannot be obliged to of common right; and eing of a preſcription is traverſed, and ought to be tried at mon law.

* [405]

OLT, *Chief Juſtice.* It is the very point adjudged in *ams's Caſe* (*b*), for it is an eccleſiaſtical duty to be performed e advantage of the pariſhioners; and though it commence by ription, yet it concerns eccleſiaſtical perſons, and is a mere ual thing, and is not at all the ſame as if it were againſt a lay- who is not ſo eaſily bound by canon law as eccleſiaſtical per- re; for their proceedings there by preſcription ſhall not charge nan, or any temporal right. In Vacation, the patron and ary may grant a penſion, and the parſon ſhall be ſued there for ed upon the ſtatute of *Circumſpectè Agatis* a prohibition was granted in that caſe; though *Coke*, in his Comment upon tatute, is of a contrary opinion.

adjorn.

See ante, 260. 397. Johnſton v. poſt. 416.

(*b*) 5. Co. 72.

Barton *againſt* Bartlet.

Caſe 681.

UR PERSONS were arreſted upon one writ, and put in bail verally; one of them non proſſed the plaintiff for want of a ation.

Non proſ. S. C. Holt, 367.

LT, *Chief Juſtice.* Till they are ſevered by declaration, the hall be intended joint; and the *non proſ.* before declaration e upon the writ, which is joint; and therefore one *non proſ.* for all, notwithſtanding the ſeveral bail.

Clay

Caſe 682.

Clay *againſt* Snelgrave.

The *maſter* of a ſhip cannot ſue in the admiralty for his wages.
S. C. Salk. 33.
S. C. Carth. 518.
S. C. Holt, 595.
S. C. 1. Ld Ray. 576.
1. Vent. 146. 343.
Ray. 3.
2. Stra. 858. 937. 968.
2. Will. 264.
4. Burr. 1950.
Doug. 101.
3. Term Rep. 267.

A LIBEL was brought by the adminiſtrator of the maſter againſt a ſhip for his own and ſeamen's wages.

And a prohibition was moved for, upon a ſuggeſtion that the contract was on land.

IT WAS AGREED by all, that the ſuggeſtion was naught, inaſmuch of ſuit for ſeamen's wages only; but the doubt was as to the maſter.

NORTHEY affirmed, that POWELL, one of the Juſtices of the Common Pleas, informed him they made no difference in the common pleas, and quoted a caſe in *Hilary Term*, in the twenty-ſeventh year of *Charles the Second*, where the Court were divided in point; and he would make a difference between a contract by deed with the maſter by charter-party and by parol; for in the firſt caſe he owned * a prohibition ſhould go, but not in the ſecond caſe; for one of the reaſons why prohibitions ſhould not go in caſe of a ſuit for ſeamen's wages is, becauſe by the civil law they may ſue for the ſhip; and that reaſon holds with us; for the ſhip is as much liable for the maſter's as for the men's wages.

* [426]

Contra were cited 12. *Co.* 78. 80. *Hob.* 217. that if the contract be by land, and duty accrue at ſea, or *vice verſa*, a prohibition ſhall go.

HOLT, *Chief Juſtice*. It is by indulgence that ſeamen may ſue for their wages in THE ADMIRALTY; but that was never extended to maſters, but once in my LORD HERBERT's time; for the maſter's caſe differs with that of mariners; for he is a principal ſervant, and he contracts with the part-owners, and the mariners with him; and a prohibition is a matter of right, with ſome reſtrictions; and that which is the ground of prohibition in theſe caſes is the contract being on land; but that does not hold in all caſes; for in the caſe of *Crafby v. Loſnell*, money was taken up on land for the uſe of a ſhip diſtreſſed in her voyage; and a conſultation was granted; otherwiſe if it were taken up before voyage begun. And in caſe of local juriſdiction, as that of the admiralty is, there is no diſtinction between the contract's being by deed and by parol; and it is hard to grant a conſultation upon prohibition granted upon a demurrer.

Peſtea, With 12 *Will.* 3. Rot. Hil. 12. *Will.* 3. Clark *v.* Bailey.

Arm. 38. Vern. 3. Lev. 6.

GOULD, *Juſtice*, *acc. in omnibus* (*a*).

(*a*) A prohibition was granted, S. C. Ld. Ray. 578. A prohibition was alſo granted to the ſeamen's wages by the maſter in the admiralty, in the caſe of Jaggar *v.* King, 2. Stra. 858.; and the ſame was alſo adjudged in Anon. 2. Stra. 936. Watkins *v.* Carter, Doug. 101.

King *againſt* Woolaſton. Caſe 683.

EBT UPON SEVERAL ASSUMPSITS. The defendant pleads, that he had given a bond for the ſame; and on demurrer judgit for the defendant (*a*).

Bond a diſcharge of *aſſumpſit*. Ante, 86.

Poſtea, Trin. 13. *Will.* 3. May *v.* King.

Adjudged accordingly Roades *v.* for *v.* Baker, 5. Mod. 136. Kearſlake *v.* Morgan, 5. Term Rep. 513.

The King *againſt* Harris. Caſe 684.

N ORDER OF SESSIONS for ſuppreſſing a cottage upon 31. *Eliz.* c. 7. (*a*) was quaſhed, for that cottages are not to be ſuppreſſed ndictment.

Cottages not to be ſuppreſſed by indictment.

(*a*) Repealed by 15. *Geo.* 3. c. 32.

Anonymous. Caſe 685.

OLT, *Chief Juſtice*. If one be bound to ſave harmleſs againſt a particular thing, the defendant ought to ſhew *cement* as done it; but if it be to ſave harmleſs generally, a *non damatus* generally will do; and if it be to ſave harmleſs in ſeveral iculars, againſt all perſons, it is general.

How a defendant may plead to a bond of indemnity.

* [407]

* Anonymous. Caſe 686.

OLT, *Chief Juſtice*. We cannot take notice of a judgment upon the cuſtom of foreign attachment in *London*, without cuſtom be ſpecially ſhewn.

In foreign attachment cuſtom muſt be ſet forth.

Stra. 641.

Anonymous. Caſe 687.

OLT, *Chief Juſtice*. If there be an ill plea, and the replication aſſign an ill breach, the plaintiff ſhall have no judgment. 8. *Co. Dr. Bonham's Caſe.*

Breach ill aſſigned.

he Pariſh of Erith *againſt* The Pariſh of Orford. Caſe 688.

DER OF SESSIONS was, "WHEREAS we are informed by "the churchwardens, &c." quaſhed.

Order of removal.

Case 689.

Dillon *against* Walcot.

On reverſal of judgment and award of reſtitution, *ſcire facias* muſt iſſue to the terre-tenants. S. C. antè, 312. Dyer, 54. 1. Keb. 141. 3. Keb. 29. 2. Salk. 595. 4. Hawk. P. C. ch. 50. ſ. 13.

WRIT OF ERROR of a judgment given in the court of king's bench in *Ireland*.

Walcot's anceſtor having been attainted of high treaſon in *Ireland*, and his eſtate granted by letters patent by *King Charles Second* to the *Earl of Roſcommon*, the judgment was reverſed on writ of error in the court of king's bench in *England*, and the reverſal affirmed before the Lords; and thereupon a mandate to the court of king's bench in *Ireland* to award reſtitution; which they did, without any *ſcire facias* againſt the terre-tenant; whereupon *Dillon* brought this writ of error, ſetting forth the attainder and a grant to the *Earl of Roſcommon*, and that the plaintiff was aſſignee of the ſaid *Earl of Roſcommon*, and that the award of reſtitution *ad damnum*, &c.

The want of *ſcire facias* againſt the *terretenants* was aſſigned for error, and *in nullo eſt erratum* pleaded.

PER CURIAM. Here is an extravagant error; for, upon reverſal, the judgment is, "that the party be reſtored to what "he has loſt, &c.;" but that muſt be known; and the way is to come and ſuggeſt that he was ſeiſed of ſuch and ſuch land, &c. to take a *ſcire facias* againſt the terre-tenants, and they thereon ought to be ſummoned, and may come and ſhew cauſe againſt reſtitution, as perhaps a fine levied by the heir, &c. or by the party himſelf; and it would be prudent in a purchaſer of an attainted perſon's eſtate to procure ſuch a fine; and this has been done by the purchaſers of *H. Martin*'s eſtate, while he lay condemned in THE TOWER.

* [408]

Case 690.

* Anonymous.

Seſſions.

INDICTMENT was taken at ſeſſions held ſuch a day by adjournment, without ſhewing from what time they had adjourned; and that exception taken, but over-ruled (*a*).

(*a*) But ſee St. Michael's v. St. Matthew's, 2. Stra. 732. Rex v. Fiſher, 2. Stra. 865. Rex v. Walker, 2. Stra. 865. Caſes, 17. pl. 21. Rex v. Hare, Burr. S. C. 102. Rex v. Hepſt Burr. S. C. 88. contra.

Case 691.

Anonymous.

IF ATTORNEY except againſt bail, he muſt give notice of it.

Case 692.

Davila *againſt* Dalmanſer.

Mutual debts may be ſet one againſt the other. 2. Burr. 820.

PER CURIAM. If there be two dealers, and they reciprocally pay money for one another, they ſhall have their reciprocal action for it, in which either of them ſhall give ſpecial bail; for

them ſhall give the money paid by him in mitigation of unleſs there be an *account ſtated*; and they never can ccount againſt one another (*a*).

DAVILA *againſt* DALMANSER.

iow by 2. *Geo.* 2. c. 22. ſ. 13. tual by 8. *Geo.* 2. c. 24. re are *mutual debts* between a and defendant, or if either or be ſued as executor or ad- r, where there are mutual veen the teſtator or inteſtate, party, one debt may be ſet e other, and either pleaded given in evidence upon the ue at the trial, &c." And by 5. *Geo.* 3. c. 30. ſ. 28. commiſſioners of bankrupts are authoriſed to take notice of mutual debts between the bankrupt and any other perſon, and to admit what ſhall be due on either ſide on the balance of ſuch account. But by 8. *Geo.* 2. c. 24. ſ. 4. if either of the debts accrue by reaſon of a penalty, it muſt be pleaded in bar. In what actions a ſet-off is allowed under theſe ſtatutes, ſee Tidd's Practice, 404. to 408.

Lord *againſt* Francis.

Caſe 693.

URIAM. An action for a falſe return is local, but may d in the county where it was made, or in that in which it n record.

Action for a falſe return is local. S. C. Holt, 170.

HOLT, *Chief Juſtice*, If one be irregularly choſe at afterwards he is owned by the town, and entered in the c, or regularly choſe into a ſuperior dignity, I ſhould take wed to be ſuch evidence of a good election (*a*) as ought controverted.

Evidence of a good election.

(*a*) See Piper *v.* Dennis, ante, 253.

Anonymous.

Caſe 694.

, *Chief Juſtice*. If a man contract for goods, and after ing them away give the ſeller a *goldſmith's note* for the does not amount to a payment; but if it were given at ime of the contract, it would be *prima facie* evidence that en in payment (*a*).

Banker's check, when payment. 7. Mod. 139. 2. Salk. 442. 1. Salk. 124. 2. Wilſ. 353.

man, upon a contract made before, take ſuch a bill, and the party on whom it is drawn becomes inſolvent, in an ught by him againſt the buyer upon that bill, he ſhall (*b*); but he ſhall recover the debt upon the original).

Banker's draft muſt be demanded in time. Stra. 415. 508. 550. 707. 910. 1175. 1248.

e now 4. & 5. *Anne*, c. 9.
rk *v.* Mundall, ante, 203.
gland *v.* Newman, ante,
ird *v.* Oakes, ante, 244.
k, poſt. 506. Eaſt India
Chitty, 2. Stra. 1175. Moor
1. Stra. 415. Manwaring *v.* Harriſon, 1 Stra. 508. Hayward *v.* Bank of England, 1. Stra. 550. Pepys *v.* Lambert, 2. Stra. 707. Hoare *v.* Dacoſta, 2. Stra. 910. Fletcher *v.* Sandys, 2. Stra. 1248. Metcalfe *v.* Hall, Bull. N. P. 275. Tindal *v.* Brown, 1. Term Rep. 167.

(*a*) Clark *v.* Adair, Eſpin. Dig. 26.

Caſe 695.

Anonymous.

If ſhip be loſt in her return, ſeamen ſhall have all outward wages, and but half while in harbour abroad.

HOLT, *Chief Juſtice.* If a ſhip go freight of an outward voyage, the ſeamen ſhall have their whole wages out; but if at * their return the ſhip be taken, or other miſchief happen, whereby the voyage homeward is loſt, they ſhall have but half-wages for the time they were in harbour abroad (*a*).

1. Vent. 146. Poſtea, Hill. 12. & 13. *Will.* 3. Weſt *v.* Weſt,

(*a*) See Campion *v.* Nicholas, 1. Stra. 1844. Abernethey *v.* Langdale, Doug. 405. Hernaman *v.* Bawden, 3. Burr. 520.

Caſe 696.

Anonymous.

Action brought by principal is a revocation of letter of attorney.

HOLT, *Chief Juſtice.* *A.* gives a letter of attorney to *B.* to receive money for him from *C.* and afterwards brings an action for the money againſt *C.* who afterwards pays the money to *B.* the attorney, it ſhall not abate the action, becauſe the commencing the action was a revocation of the letter of attorney.

Caſe 697.

The King *againſt* The Pariſh of Ragley.

Highway. S. C. Fort. 250.

ERROR of a judgment upon an indictment at the quarter-ſeſſions for non-repairing "a highway between *A.* and *B.* in the "pariſh of *R.*" The judgment was, that ſuch a ſum *extrahatur et levetur* to repair the ſaid way, *niſi* it were repaired by ſuch a time.

HOLT, *Chief Juſtice*, There are ſtatutes that direct the certainty of proceedings in theſe caſes; as that of 2. & 3. *Phil. & Mary*, c. 8. and 13. *Eliz. &c.*; and they are impowered by law to charge or fine, and that alone to be controlled by traverſe. By the ſtatute of *Philip and Mary*, a juſtice of peace may preſent at the quarter-ſeſſions upon his own knowledge; and the juſtices there are to give as much credit to it as if it were by jury; and that is a public law (*a*).

Pariſh to repair highway of common right.

The pariſh of common right ought to repair their highway; but by preſcription one pariſh may be bound to repair the way in another pariſh.

How an indictment for non-repair muſt ſtate the *locus in quo*. Stra. 181.

AND HERE IT WAS EXCEPTED, that it did not appear in what pariſh the way was; for it was laid to be "between *A.* and *B.* in "the pariſh of *R.*;" ſo that *B.* only may be in *R.*

Judgment for not repairing highway erroneous.

ANOTHER EXCEPTION was, that the judgment was prepoſterous, *extrahatur et levetur*, inſtead of the natural way of *levetur et extrahatur*.

(*a*) See 13 *Geo.* 2. c. 78. ſ. 19. 2. Hawk. P. C. ch. 76. ſ. 67. and Rex *v.* Juſtices of Wilts, 1. Black. 467.

An

or this exception the judgment was reverſed; and com- THE KING
lebt upon bond for ten pounds, if judgment were "*ideo* *againſt*
ratum eſt, quòd habeat executionem de præd. 10. *et recu-* THE PARISH
OF RAGLEY.

URIAM. It would be error.

Pet *againſt* Pet. Caſe 698.

URIAM. The words "brother and ſiſter," and "col- *Brothers grand-children* cannot
teral," in the ſtatute of Diſtribution (*a*) ought in all rea- ſhare with *brother's children.*
er to the inteſtate, for inteſtates are the * ſubject matter; S. C. Salk. 250.
is court they would never hear argument for diſtribution S. C. 3. Salk 138.
e ſtatute, but once, in conſideration of SIR FRANCIS S. C 1. Ld.
r, who, finding it would not do, procured this ſtatute to Ray. 571.
; and the proviſo is, that there ſhall be no diſtribution in S. C Comy. Rep.
s beyond brothers and ſiſters children; and that muſt be 87.
and ſiſters of the inteſtate. It was upon debate upon a S. C. 2. Eq. Abr.
or a *mandamus*. 435.
S. C. Holt, 259.
S. C. 1 Peer.
Wms. 25.

e words of the act 22. & 23. "rals after brothers and ſiſters chil-
o. are, "provided no repre- "dren."
be admitted amongſt collate-

Anonymous. Caſe 699.

, *Chief Juſtice*. If an officer make an ill return, he ſhall *Mandamus.*
merced, and we will not allow him to quaſh the ill return
another; and if, upon diſallowance of one return, he
ſecond bad, *an attachment* ſhall go.

Mitford *againſt* Walcot. Caſe 700.

ws a bill of exchange at *Madrid*, in *Spain*, on *B.* at Acceptance of a
ſterdam, payable at *two uſances*. *B.* after the two uſances, bill of exchange
fourth day, which was the laſt day of grace, accepts the is an actual pro-
ndon; and for non payment the action is brought againſt miſe to pay.
d the declaration ſhewed the days of drawing and accept- S. C. Salk. 129.
which this fact appears. S. C. Comy. 75.
S. C. 1. Ld.
URIAM. FIRST, An acceptance is an actual promiſe to Ray. 574.

loubt then was upon the variance of days of grace at How far the ac-
m and in *England*; for there they have eight, and but four ceptance of a bill
d that, as it was urged by the cuſtom of merchants, an of exchange af-
ce at *Amſterdam* after time of payment was void, and the ter it becomes payable binds the acceptor.

Wilkinſon *v.* Lutwiche, Stra. and Hopkins, 3. Burr. 1663. Maber *v.*
onds *v.* Parminter, 2 Wilſ. Mathias, 2. Black. Rep. 1072.
ns and Roſe *v.* Vanmierop

MITFORD *againſt* WALCOT.

days of grace are no part of the uſance; and the acceptance here being to pay *juxta tenorem bill. præd.* it muſt be underſtood the ſame as if it were at *Amſterdam*, for there it was directed and payable.

But it was agreed here,

FIRST, That an acceptance or negociation in *England*, after a bill becomes payable, ſhall bind the acceptor or indorſor, though not perhaps the original drawer. And for this was quoted the caſe of *Pigot v. Jackſon (a)*, in this court, in *Hilary Term*, in the ninth year of *William the Third*, though it were an acceptance to pay *juxta tenorem bill. præd.* as here.

Uſance.

SECONDLY, It was reſolved, *a uſance* is a month at twenty-eight days.

Acceptance.

THIRDLY, If bill be accepted at *Amſterdam*, and no houſe named where the payment is to be, the party need not acquieſce to it, but may proteſt the bill; but if he will acquieſce, it is well enough.

Acceptance for honour of the drawer.

FOURTHLY, If *A.* draw a bill on *B.* who will not accept it, and *C.* offers to accept it for the honour of the drawer, the drawee need not acquieſce, but may proteſt; but if he do acquieſce, *C.*

* [411] *

is bound.

Acquieſcence to acceptance.

FIFTHLY, If bill be drawn on one at *Amſterdam*, and he do not care to accept it, but gets one here to do it, the party need not acquieſce; but if he do, the party here is bound.

And judgment was given for the plaintiff *niſi*.

(*a*) Ante, 211, 212. 1. Ld. Ray. 364. 1. Salk. 127.

Caſe 701.

Rock *againſt* The Sheriff of Saliſbury.

If an executor has aſſets to pay a judgment debt, and ſuffers judgment in an action on a ſimple contract to go againſt him by default, and then prays the judgment-debt, the ſheriff, on a *fieri facias* on the ſecond judgment, may return a *devaſtavit*, and thereby intitle the plaintiff to an execution *de bonis propriis* of the executor.—S. C. Holt, 644. Ante, 352.

AN EXECUTOR owed one hundred pounds by judgment, and had aſſets to pay it, and owed another ſum by contract, for which he was ſued, and ſuffered judgment to go againſt him by default; he paid the former judgment, and a *fieri facias* is brought againſt him upon the ſecond; to which the ſheriff at firſt day returned a *devaſtavit*. And this action was brought for a falſe return.

AND IT WAS AGREED, that if a miniſterial officer act falſly in his duty, to the prejudice of another, an action will lie for it (*a*).

And here IT WAS URGED, that the ſheriff had no more to do but to levy the money *de bonis teſtatoris*, if any be found, or elſe to return *nulla bona*; and then the plaintiff, upon ſuggeſtion of a *devaſtavit*, might have a *ſcire facias* to enquire of a *devaſtavit*; and if by inquiſition a *devaſtavit* were found, to warn in the executor to ſhew cauſe why judgment ſhould not be *de bonis propriis*.

(*a*) Ante, 392.

And

it was further urged, that there was no *devaſtavit* in the
or the ſuffering judgment by default was no confeſſion of
but the judgment is conditional, if there be aſſets in our
to be levied of them, and the ſheriff has no return to make,
it he levied goods to the value, &c. or that there are no
and there is nothing in the writ to warrant ſuch a return
is: and ſuppoſe our ſuffering judgment by default be a con-
of aſſets, yet it is not a confeſſion of a *devaſtavit*, which he,
ſuggeſtion, as aforeſaid, ought not to return.

AS URGED *on the other ſide*, that it was clear the ſheriff
well return a *devaſtavit*, but at his peril, if it were falſe.
udgment by default is not an abſolute confeſſion of aſſets,
y a confeſſion of all the aſſets he ever had; for if the execu-
ad adminiſtered them, he ought to ſhew it in pleading; and
not, he is too late after judgment by default. If two actions
nſt an executor of the ſame Term, each of one hundred
and he has aſſets but for one, and pays it, and ſuffers judg-
y default in the other, he ſhall pay it; and the reaſon is, be-
by not pleading to the ſecond action, * he confeſſes all the * [412]
e ever had, and cannot avoid it by pleading; and if he had
no aſſets, and judgment is againſt him, he ſhall not avoid
dita querela, becauſe he had not an opportunity of pleading

T, *Chief Juſtice*. A *devaſtavit* is a very proper return
theriff to make; and upon ſuch a return execution ſhall be
propriis, and not a conditional one, and is never otherwiſe;
reaſon is, that when a *feri facias* goes, it is *de bonis teſta-*
and if the ſheriff find no goods of the teſtator, and is ſatiſ-
a *devaſtavit*, he cannot execute the writ of the goods of the
r, but ought to return the truth, a *devaſtavit*, and then he
ve power to make execution *de bonis propriis*. And when
plene adminiſtravit aſſets *ad valentiam* are found, the ſheriff
turn a *devaſtavit*, if he find not aſſets, and the executor ſhall
void it. Here there were aſſets, but liable to a former judg-
which he might have pleaded, but omitted; and how can he
vantage of it now. If there be judgment in debt againſt a
n tail, who dies ſeiſed, the eſtate deſcends to the iſſue. *Scire*
s ſued againſt the heir and terre-tenants; iſſue is returned
and terre tenant of lands in fee for anceſtor had both lands
nd tail, and judgment by default, and an *elegit* of a moiety
and then the iſſue came to ſhew the lands were intailed;
cted, becauſe he omitted to do it in his proper time upon
e feci returned. So it is in caſe of judgment and releaſe,
re feci returned, if he do not plead the releaſe before judg-
pon the *ſcire facias*, he ſhall not have *audita querela*. *Vide*
Hannor v. Muſe, 283. For when you have a good matter
and an opportunity to plead it, you ſhall not give it in evi-
And though it be ſaid, that the judgment by default was
t of a demurrer, yet that will not alter the caſe. *Vide* 5. *Co.*

When there is matter in bar to be pleaded, and omitted, not to be given in evidence.

Rook *againſt* The Sheriff of Salisbury.

32. And PER LUY, If two actions are brought againſt an
tor of one hundred pounds each, and he has aſſets only for o
he pleads *plene adminiſt.* to both, and then pays off one, and
the other to go by default, he ſhall anſwer *de bonis propriis*
and ſo if there were ten actions, and he pleads *plene adminiſtr*
all, and afterward pays off one, which is all he has, and then
judgment to go by default, he ſhall be charged with all th
de bonis propriis; ſo that your conceſſion, that it amount
confeſſion of no more than he once had, was too liberal. *A*
HALE's time, if executor had pleaded ſeveral judgments, a
* [413] of them were found * againſt him, he uſed to direct the jury t
for plaintiff generally; but that was a little hard; and here y
eſtopped to ſay ſheriff made a falſe return, to charge him wh
might have pleaded it in court.

Judgment was given for the defendant.

Caſe 702.

Anonymous.

Good behaviour. Poſt. 566. Lamb. 115 Dalt. ch. 75. Cro. Car. 498. 3. Hawk. P. C. ch. 1. page 15. to 16.

HOLT, *Chief Juſtice.* By law none can be compelled to
ſurety for his good behaviour, except it be by ancient cu
within a leet, or for vagrancy, or ſome certain offence; and
one being committed thus, "WHEREAS *A.* has been conv
"of a miſdemeanor, and cannot find ſecurity for his good b
"viour; therefore, &c." And here could be no *certiorari*, t
being no record of the conviction; the party being brough
upon *habeas corpus* was diſcharged on motion. PER CURIA

Caſe 703.

Hill *againſt* Wilks.

Outlawry reverſed.

IT appearing to the Court plainly, that *Wilks* had got *Hill*
lawed when he was viſible, and to his knowledge eaſily m
be ſerved with proceſs, he was ordered to reverſe it at his
charges. *Vide Sir Thomas Jones*, 211.

Caſe 704.

The King *againſt* Sellinger.

The Court will not quaſh an indictment for *crim. con.* on motion.

SELLINGER was indicted for lying with another man's
and moved to quaſh it as a matter not indictable. But
CURIAM, We will not quaſh an indictment for matter of
nature on motion; but demur if you will.

Caſe 705.

Levins *againſt* Randall.

In an action by the treaſurer of an Inn of Court againſt a member for dues, it is ſufficient to aver they were not paid to the treaſurer. Ray. Ent. 475.

LEVINS, treaſurer of *Gray's Inn*, brought debt againſt *Ran*
a member of that ſociety, upon a bond for forty pounds, c
ditioned for payment of *commons* and other duties of the ho
ſufficient to aver they were not paid to the treaſurer.—S. C. 1. Ld. Ray. 554.

U

" conditions performed" pleaded, it was replied, that *Gray's* an ancient ſociety, &c. and that time, &c. every member , at his being called to THE BAR ſhould pay ſo much to the he houſe; and the neceſſary averments made. LEVINS *againſt* RANDALL.

: FIRST EXCEPTION to the replication was, that it was aver- t it was not paid to the houſe, and it might be paid to the :r.

non allocatur; for payment to the treaſurer is payment to the as payment to the chamberlain of *London* is payment to the

ND EXCEPTION, That this was in the nature of a *nomine* and therefore not due till an actual demand; which was not d. An action by the treaſurer of an Inn of Court on a bond for *dues*, need not ſtate that they were *demanded*.

HOLT, *Chief Juſtice*, Surely there is a difference between a nd a *nomine pœnæ*.

LD, *Juſtice*. Where the thing in its nature requires a l, a bond for doing thereof is not forfeited till demand: and caſe the defendant muſt take advantage of the want of l, by pleading that he was always, and ſtill is, ready to pay if he plead performance generally, and the plaintiff aſſigns a in his replication, the defendant ſhall not rejoin and alledge f demand, for that would be a departure. 3. Cro. 828. Noy. 16. 1. Saund. 117. 1. Vent. 36. 2. Saund. 85. 1. Lev. 47, 48. Hutt. 90.

d HOLT, *Chief Juſtice*, *conceſſit*. *Vide* 1. *Cro.* 76, 77.

IRDLY, It was objected, there could not be a preſcription ment of ſhillings, which was a new coin, for the old coin iarks; but no heed was taken of it. Preſcription to receive ſhillings.

judgment was given for the plaintiff, *niſi*.

Aſhfield *againſt* Neal.

Caſe 706.

TION AGAINST TWO, and before plea one of them dies, The death of a defendant before plea may be ſuggeſted, and the ſuit continued.

E, By the late act of *William the Third*, the plaintiff may nd ſuggeſt this matter on record, and pray leave to go on the other; but if the action were brought againſt one of the defendant might plead in abatement that the other is but in this caſe the ſurvivor pleaded in bar, and judgment ainſt him.

in entering up the judgment it was moved, that the attorney nter a *non dedicit*, becauſe he confeſſed the party dead by his

r, *Chief Juſtice*. Let it be entered ſo, and the other con- eny it; and let him look how he puts his coſts upon it.

The

Caſe 707.

The King *againſt* Walden.

Indictment for words ſpoke to juſtice of peace.

1. Vent. 50. 1. Lev. 52. Stra. 421. 617. 1168.

INDICTMENT, for that the defendant being before a of peace, for a matter, as it did appear, conuſable by h contemptuouſly, &c. ſpoke theſe words: "Your worſhip "to me here, but you dare not do ſo in another place." An quaſhed on motion (*a*).

(*a*) See 1. Roll. Abr. 57. Cro. Car. 14. 1. Com. Dig. "Action f "mation" (D. 15.).

Caſe 708.

Anonymous.

Inſpection of charters.

HOLT, *Chief Juſtice*. We never order charters to be b into court on trials, when copies of them may be had Rolls (*a*); but we will compel them to give you ſight of the

(*a*) See Cutts' Caſe, ante, 394. caſtle, 2. Stra. 1222. and the ca
(*b*) See Rex *v.* Hoſtman of New. cited.

* [415]

Caſe 709.

* Lacy *againſt* Kynaſton.

If covenantee agree to ſave covenantor harmleſs, it is a defeaſance.

S. C. ante, 221. S. C. poſt. 548. S. C. 1. Ld Ray. 419. 688. S. C. Salk. 573. 575.

HOLT, *Chief Juſtice*. If *A.* covenant to do ſuch a thin covenantee agree to ſave him harmleſs, that is a defeaſa the covenant. If two be bound jointly and ſeverally in a bon releaſe is to one of them, it releaſes the ſeveral as well as th lien. *A.* is bound by bond to *B.* and *B.* covenants not to pu ſuit till ſuch a time, it is a defeaſance; but if he grants not upon it at all, it is a releaſe.

S. C. 3. Salk. 298. S. C. Holt, 178. 218.

Caſe 710.

Anonymous.

Apprentice's maſter entitled to what apprentice earns.

HOLT, *Chief Juſtice*. Trover lies for the maſter for a t or other writing entitling his apprentice to money earne him during the apprenticeſhip (*a*).

Trover will not lie againſt executor of an apprentice for a ticket iſſued after his death.

But here the trover was againſt the executor of the appren for a ticket given out after the death of the apprentice, for mo earned by him during the apprenticeſhip; and becauſe it never in the apprentice's poſſeſſion, the action was not maintaina but after the executor receives the money, the maſter may h *aſſumpſit* for ſo much money received to his uſe.

(*a*) See Barber *v.* Dennis, Salk. 68. Hill *v.* Allen, Vezey, 83. 1 Juſtice, 17th edit. 90.

ICHAELMAS TERM,

The Twelfth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Turton, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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* Anonymous.

Caſe 711.

R B SHOWER, *Knt.* moved for a prohibition for libelling in the ſpiritual court for a pariſh rate, for mending and cleanſing the pariſh organs; and it was granted (*a*).

Prohibition on libel for mending an organ.

Rep. 126. 2. Roll. Abr. 311. 2. Mod. 8. 222. 6. Com. Dig. "Prohibition" (G. 2.). Dig. "Egliſe" (G. 3.).

See Jeffery's Caſe, 5. Co. 67. 1. Burr. 240. Palmer *v.* Biſhop of v. Davenant, 1. Mod. 194. 236. Exeter, Stra. 570. Cart *v.* Marſh, Andr. ious, Poph. 197. Campbell *v.* 69. Forty *v.* Owhear, Fort. 346. But- 2. Will. 79. Wilſon *v.* Greaves, terworth *v.* Barker, 3. Burr. 1689.

Johnſon *againſt* Ryſon.

Caſe 712.

EL was in the ſpiritual court for *a mortuary* alledged due cuſtom. The ſuggeſtion ſet forth the ſtatute of 21. *Hen.* 8. id that there was no cuſtom in that pariſh for the payment of ries.

No prohibition for ſuit for *a mortuary*, not having pleaded there was no cuſtom.

S. C. 1. Ld. Ray. 609. Ante, 326. 1. Vent. 5.

. CURIAM. There is no colour for a prohibition, ſince you ot pleaded; for *a mortuary* is a thing within their juriſdicand if there were any room for a prohibition, it would be for of a cuſtom; and then that ought to have been pleaded: compared it with a *modus decimandi*, for which there is no y but in the ſpiritual court; and the caſe of *Hind v. Biſhop of*

JOHNSON *againſt* RYSON.

Ante, 397. 404. 405.
Vide 1. Vent. 3. 120. 335.
2. Vent. 239.
2. Cro 483.
N. B. 50.
3. Cro. 675.

of Cheſter (a) is not like this; for the ſtatute excepts *a mortuary*, and *a mortuary* is a mere eccleſiaſtical right, for which there is no remedy but in the ſpiritual court; and though a writ of annuity may lie for a penſion by preſcription, and ſo recoverable at common law, yet it may be ſued for in the ſpiritual court, againſt the opinion of *Coke (b)*; which opinion has been frequently exploded ſince.

And the rule for a prohibition was diſcharged *(c)*.

(a) Cro. Car. 237.
(b) 2 Inſt. 491.
(c) See the caſe of Johnſon *v.* Oldham, 1. Ld. Ray. 609. *acc.* and Jones *v.* Stone, 3. Ld. Ray. 578.

* [417]

Caſe 713.

Wilmout *againſt* Tyler.

An *appellant* cannot have a *habeas corpus* until the ſheriff has returned *cepi corpus et parat. habeo.*

S. C. poſt. 448.
S. C. 1. Ld. Ray. 671.
S. C. 1. Salk. 63.
Poſtea, Paſch. 13. *Will.* 3. Willmot *v.* Tiler.

HE was found guilty of manſlaughter upon an indictment for murder; and the COURT at THE OLD BAILEY being diſſatisfied with the verdict inflicted eleven months * impriſonment upon him, according to the ſtatute of 18. *Eliz.* c. 7. And being thus in the ſheriff's cuſtody, AN APPEAL was brought; to which the ſheriff returned *cepi corpus*, but that he could not bring him without a *habeas corpus*.

PER CURIAM. The return is not good, for it ſhould have been *cepi corpus et parat. habeo*, and then the appellant may have a *habeas corpus* returnable *immediatè*; and you muſt be well adviſed how you file this return.

An *appellee* who has received clergy on a conviction of manſlaughter, ſhall have time to plead ſuch ſpecial matter to the appeal. Poſt. 426.

And the return being amended, a *habeas corpus* taken, and the appellee brought to the bar, and the appellant called, who appeared; after the appellee's arraignment, which was in *French*, the Counſel for him demanded *oyer* of the writ, and time to plead.

PER CURIAM. Of right you ought to plead *inſtanter*; but ſince he has had his clergy before upon the indictment, and ſo has a ſpecial matter to plead, you ought to have convenient time to plead; but it muſt be *quaſi inſtanter*, and as of this day, and no imparlance entered.

And he was committed to the Marſhal.

Caſe 714.

Muſgrave *againſt* Eſcourt.

No ſuit.

HOLT, *Chief Juſtice*. A man may be nonſuited in Term-time, and the record made up in the Vacation; but it muſt be on THE ROLL of the preceding Term.

Anonymous

Anonymous. Caſe 715.

DER OF JUSTICES OF PEACE willing churchwardens to a ſcrivener five pounds due to him for drawing of indenſetting out poor children to trades, was quaſhed, as being at of their power *(a)*; but the way had been, to order a e for levying ſo much a week till a convenient ſum were id in that caſe, as ſoon as money was raiſed, an action for the ſcrivener againſt the churchwardens.

Juſtices of the peace cannot order overſeers to pay a ſum certain.

Reg. *v.* Belzun, 11. Mod. Chicheſter, Foley, 33. Rex *v.* Welch, *v.* Ware, 1. Conſt, 272. 1. Conſt, 277. Rex *v.* Goodcheap, ehouſe, Foley, 22. Rex *v.* 6. Term Rep. 159.

The King *againſt* Dorney. Caſe 716.

QUISITION OF FORCIBLE ENTRY was quaſhed, for that d not appear what eſtate the party on whom the entry was ; for if he were tenant at ſufferance, it would not lie.

Forcible entry, what eſtate the party had muſt appear.

1. Ray. 610. S. C. Salk. 260. S. C. Holt, 267. Poph. 205. 7. Mod. 115. 123.). 2. Hawk. P. C. c. 64. ſ. 36.

* Wall *againſt* Grovet. Caſe 717.

URIAM. If one bind himſelf in a bond to go to a place n being, or do other impoſſible thing, the obligation is

Obligation to do an impoſſible thing is ſingle.

1. Inſt. 206. a. *et lib. ibi cit.* 1. Roll. Abr. 419.

:ASE was, One laid a wager that he would walk in ſuch "*High-Park Corner*;" and the place being "*Hyde-Corner*," and no ſuch place as "*High-Park Corner*," he ager.

The King *againſt* Fowler. Caſe 718.

ER was brought up by *habeas corpus*, being taken up an *excommunicato capiendo* returned in this court; by appeared, that the *ſignificavit* was "*pro ſubſtractione rum ſive aliorum jurium eccleſiaſticorum.*"

The cauſe of excommunication muſt be particularly ſpecified, not only in the *ſignificavit*, but in the writ of *excommunicato capiendo.*

HEY moved to have him diſcharged, for that the cauſe, ght to appear certainly in the *ſignificavit*, was altogether by the "*ſive aliorum, &c. (a).*

Chief Juſtice. The writ of excommunication need not e cauſe, but is well generally "*pro contumaciâ (b)*; but *:avit* ought to expreſs the cauſe. But ſince the ſtatute of :. 23. by which *the writ* is firſt to be brought into this l to be delivered of record to the ſheriff, who is to return the cauſe ought to appear ſpecially in *the writ*, becauſe the Court cannot know how to follow the directions of

S. C. Salk. 293. 350. S. C. Holt, 334. S. C. Fort. 243. S. C. 1. Ld. Ray. 586. 618. Stra. 950.

:e Annally, 314. and Rex *v.* (*b*) Fitz. Nat. Brev. 63. Reg. Orig. tra. 950. Rex *v.* Smith, 65.

But

A writ of *excommunicato capiendo*, which does not ſpecify the particular cauſe for which the party was excommunicated, but only "for "ſubtraction of "tithes and o-"ther eccleſia-"ſtical dues," may be quaſhed on a *habeas corpus*.

But the doubt was, Whether the Court could quaſh the writ here for this uncertainty; or, Whether the party ſhould not go into chancery, where the *ſignificavit*, which was only recited in the writ, was, and move there to have the writ ſuperſeded *quia erronicè emanavit*.

And as to that NORTHEY argued, that the ſtatute, by directing the *capias* to be delivered to the officer of record here, and returned here, did impliedly give the Court power over it. *Vide* 2. *Cro.* 566, 567. *Cro. Car.* 196. *Juſt. Jo.* 226. *Mo.* 667.

HOLT, *Chief Juſtice*. I would ſee precedents ſince the ſtatute whether the form of the writ be changed ſince, as it were reaſonable it ſhould, that the Court might proceed or not, according as it ſeem to them proper, on the face of the writ; and if the writ be bad, and by the ſtatute made returnable here, it is fit we ſhould have power over it; for when a writ is gone out of chancery, returnable in another court, that court wherein it is returnable are the judges of the validity of it; and therefore * we ought to have the writ itſelf here; and if it prove not good, to quaſh it *quia minus ſufficiens in lege*, and then ſend a *ſuperſedeas* to the ſheriff; but this ought not to be upon a *habeas corpus*, but upon the return of the writ by the ſheriff. Indeed there have been ſeveral diſcharged upon a *habeas corpus* for one of the nine caſes within the ſtatute; but whether that ſhould be upon plea pleaded, or on motion, was a *vexata quæſtio*.

* [419]

And at another day precedents were produced *pro* and *con*. 8. *El. Rot.* 20. general, ſame year. *Rot.* 44. ſpecial cauſe mentioned. 15. *El. Rot.* 54. 17. *Jac. Rot.* 111. *Hilary Term*, 17. & 18. *Car.* 2. *Rot.* 2.; ſome as here, others with an *ad rumque jurium eccl.*

And at laſt he ſaid, he thought they were wrong upon the *habeas corpus*, becauſe it was a good return to a *habeas corpus*, that he was committed upon an *excommunicato capiendo*, without any more.

And let the writ be quaſhed *niſi* in a week; and *ſuperſedeas niſi*; and that was the rule.

NOTE, While this matter was under debate, the party was bailed.

Caſe 719.

Anonymous.

Suit may be in the ſpiritual court after death of one of the parties, for incontinency.

A WOMAN was libelled againſt in the ſpiritual court for *incontinency* with a man ſince dead.

It was ſuggeſted for a prohibition, that the man was her huſband: and now the ſpiritual court could not examine whether he had been her huſband or not, becauſe that would tend to baſtardize the children, and diſſolve the marriage after the death of the party.

HOLT,

ANONYMOUS.

OLT, *Chief Juſtice.* If there were a marriage *de facto*, igh illegal, yet they ſhall not libel to avoid it after the huſband's h; but if there was none, the death of the man ought not to ſtop her from a proſecution for her whoredom (*a*).

(*a*) See the caſe of Hemming *v.* Price, poſt. 432.

The King *againſt* The Inhabitants of Longcrichill. Caſe 720.

:R CURIAM. If on appeal a pariſh be adjudged the laſt legal ſettlement of a poor perſon, that pariſh is concluded thereby, only as to the pariſh from which the firſt order of removal was, alſo as to all other pariſhes (*a*).

If an order is confirmed on appeal it is concluſive.
S.C. 2. Salk. 489.
S. C. Holt, 510.

ECONDLY, It is a fatal exception to an order of two juſtices, it does not ſay that one of them was of the *quorum*. *Vide* ſta- 13. & 14. *Car.* 2. (*b*).

One juſtice to be of the *quorum*.

* [420]

'HIRDLY, If an order be made to remove a poor perſon from o *B.* and then he comes to *C.* the juſtices cannot graft * an r for ſending him to *B.* upon the firſt order, becauſe they are parties to it; but ſuch order may be given in evidence of a ement in *B.*

A pauper cannot be removed from *C.* to *B.* under an order to remove him from *A.* to *B.*

) 3. Burr. 551. 2. Term Rep. 598. tt, 860.
) But now by 26. *Geo.* 2. c. 27. no order ſhall be quaſhed for this exception. —See S. P. ante, 393.

Anonymous. Caſe 721.

OLT, *Chief Juſtice.* If a perſon preach in a pariſh-church without leave of the parſon, he is a treſpaſſer (*a*).

Preaching.

(*a*) See the caſe of Turton *v.* Reignolds, poſt. 433.

* The Duke of Schomberg *againſt* Murrey. Caſe 722.

WAS MOVED to have leave to charge *Murrey*, being a priſoner *Newgate*, with a *ſcandalum magnatum* and *ac etiam billæ* of undred pounds, in order to hold him to ſpecial bail, for ſaying *Duke of Schomberg* was a cheat, and had cheated the king and my.

Scandalum magnatum.
S. C. Holt, 640.

OLT, *Chief Juſtice.* This being a poor man, to charge him will be a perpetual impriſonment to him; and ſpecial bail has often demanded in theſe actions, yet it has been frequently d.—But he was ordered to find two that would ſwear them- worth twenty-five pounds each, and himſelf be bound in one red pounds.

Burnet

Caſe 723.

Burnet *againſt* Wells.

"He is a "cheat" not actionable, without a *colloquium*.

1. Roll. Abr. 53. Cro. Car. 515. Raym. 62. 1. Sid. 35. 48. Show. 181. Cro. Jac. 204. Salk. 694. Stra. 797. 1169.

CASE. Theſe words ſpoke of a tradeſman, "He is a cheat;" and further at another time, with a *colloquium* of him and his trade, "He has nothing but rotten goods in his ſhop." Judgment by default, and ſeveral writs of enquiry.

And PER CURIAM, This was prudently done, the firſt words being not actionable without a *colloquium*, and therefore entire damages would ſpoil all. Thus the plaintiff having releaſed the damages upon the firſt words took judgment upon the ſecond, which were held clearly actionable. But it was agreed, if the words were only that "he had rotten goods," the action would not lie; for the ſlander is, to have nothing but rotten goods.

Judgment was given for the plaintiff *(a)*.

(a) See Davis v. Miller, Stra. 1169. and Saville v. Jardine, 2. H. Bl. Rep. 531. and the caſes there cited.

Caſe 724.

Heliard *againſt* ——.

Perſon found bailiff generally muſt account for all in declaration.

S. C. Holt, 713.

HOLT, *Chief Juſtice*. If a verdict find one perſon another's receiver or bailiff generally, it ſubjects the defendant to account for the whole declaration; but if it find him receiver only ſpecially as to ſuch and ſuch things, he is only accountable *pro tanto*.

* [421]

Caſe 725.

* Morley *againſt* ——.

Diſcontinuance. 3. Bl. Com. 458. 1. Tidd's Pract. 419. 2. Sellon's Prac. 459.

PER CURIAM. If the defendant plead as to part, and ſay nothing as to the reſt, it is *a diſcontinuance*, unleſs the plaintiff will take judgment by *nil dicit*.

Caſe 726.

Hammond *againſt* Ouden.

A declaration for non-delivery of ſix hair and ſplitted ſieves ſhall be intended to mean ſix of each kind.

ACTION ON THE CASE. The plaintiff declared, that in conſideration of ſeventy pounds paid by him to the defendant, the defendant *ſuper de aſſumpſit* to deliver to the plaintiff, on or before the eighteenth day of *January* following, on board the plaintiff's ſhip in ſuch a place, twenty-five quarters of oatmeal, and ſix hair and ſplitted ſieves. The plaintiff alledged, that he did bring his ſhip, on the ſaid eighteenth of *January*, to the ſaid place, and that the defendant did not deliver to him, &c. Verdict, and damages for the plaintiff.

COWPER took exceptions to the declaration.

FIRST, That it was altogether uncertain, ſo that a jury could not aſſeſs damages upon it; for it did not appear how many of the ſieves were to be hair, and how many ſplitted.

SECONDLY,

HAMMOND against QUEEN.

ONDLY, That the things were to be delivered on or before ghteenth of *January*; and the breach is laid in not delivering eighteenth, when the promiſe might be well performed in ring at any time before.

PER CURIAM, As to the firſt, if a man bind himſelf to give r ſix cows and horſes, it muſt be ſix of each, and it ſhall be ſeverally as ſtrongeſt againſt the grantor. Beſides, here it is *ſex cribras*," ANGLICE hair and ſplitted ſieves; and we t take notice but a hair ſieve and a ſplitted one are the

to the ſecond THEY HELD (but profeſſed there was no occa- o be poſitive as to that), that the declaration was good h, without ſaying that there was no delivery before the enth; for though the defendant had election to deliver them the eighteenth, yet for that there muſt have been a concur- of the plaintiff, for he muſt be there and accept; for the lant cannot make a tender before the eighteenth ſufficient to him from making a delivery on the eighteenth; for the enth being the ultimate time the law appoints for the doing it, ie party ought to be there to tender, and the other to accept. f the defendant * had come before the eighteenth to the place, ndered it, it would not excuſe him from tendering at the day. 2. 18. Condition for payment of money at or before ſuch a upon which debt was brought; and the defendant pleaded, ie was at the place at a day before, and tendered the money, at the plaintiff was not there to receive it; and held no good for though he had election to pay before or at the day, yet nnot make tender before the day, if the plaintiff be not there g to receive it; and you cannot compel him to receive r; therefore the laſt day, which is the day appointed by both s, they ought to meet, the one to tender, the other to receive. 2. 73. *Sed quære*, If he had given the plaintiff notice that he deliver at ſuch a day before, whether the plaintiff ought not there then to receive. 2. *Cro.* 9, 10. 14.

If a thing is to be done on or before a certain day, muſt be there ready to tender it at the laſt convenient time. Tender before will not excuſe.

Ante, 399.

Poſtea, Trin. 13. *Will.* 3. Lancaſhire v. Hillingworth.

* [422]

1. Vent. 147.

Vide 2. Cro. 9, 10.

Yel. 36.

2. Cro. 14.

3. Lev. 104.

Ante, 399.

t if the declaration were faulty in that point, yet it is helped rdict; for if there had been a delivery before the *nuary*, that would have made iſſue for the defendant, and the ould not find for the plaintiff. *Peeters v. Opie (a)*, Action a promiſe, that in conſideration the plaintiff ſhould build a for the defendant, the defendant ſhould pay the plaintiff one ed pounds. The plaintiff avers, that *parat. fuit et obtulit ſe*, at the defendant did not pay him; and it was adjudged, that as no good breach; for if the defendant was to pay the money building of the houſe, he ſhould ſay that he brought his mate- and that the defendant hindered him, for he ought to ſhew e has done all that was in his power; but upon *non aſſumpſit*, rdict, the plaintiff had judgment: and this is a ſtronger caſe ours. 1. *Sid.* 13. 1. *Saund.* 228. An action for falſely and

3. Lev. 104.

(a) 2. Saund. 350. S. C. 2. Lev. 23. S. C. 1. Vent. 377. 214. S. C. 2. Keb. 707. S. C. 3. Keb. 45.

HAMMOND *againſt* OUDEN.

malicioufly indicting is no good declaration, without ſaying was *without probable cauſe*, and that the plaintiff was acquitt or an *ignoramus* returned (*b*); and yet this fault was hel verdict. 1. *Vent.* 219. *A.* promiſes to pay *B.* money, an died within age of eighteen to pay to his executor; the e brings the action, and avers, that there was no payment without ſaying anything of his teſtator; and yet cured l dict.

Judgment for the plaintiff.

(*a*) See Lewis *v.* Farrel, 1. Stra. 114. Parker *v.* Langley, 10. Mod. 145 209.
(*b*) Jones *v.* Gwyne, Salk. 15. 10. Mod. 148. 214. Gilb. 185. C Robinſon, 2. Stra. 691. Wick tum, 4. Term Rep. 247.

* [423]

Caſe 727.

* Clapham *againſt* Wray.

Entry ſigned by a judge, of a perſon ſurrendering himſelf in diſcharge of bail, is the record of it.
S. C. Holt, 614.

HOLT, *Chief Juſtice.* When a priſoner renders hi diſcharge of bail in a Judge's chamber, the courſe is an entry of it in a piece of parchment, ſigned by the which is ſent over with the priſoner to THE MARSHAL, a to be brought back and filed in the office, and is in t record; and the entry in the Judge's book is not very mat

Caſe 728.

Anonymous.

Seal muſt be put by the mayor.
4. Term Rep. 699.

HOLT, *Chief Juſtice.* If a perſon, pretending to b of a corporation, put the corporation ſeal to a deed, not, by that, the deed of the corporation.

Danv. 44. 10. Co. 30. 1. Vent. 257. 1. Lev. 46. 1. Sid. 8. 1. Salk. 255. 1 Ky 268. 301. 450.

Caſe 729.

Anonymous.

Prohibition.

HOLT, *Chief Juſtice.* In a prohibition, either of th contending below may be plaintiff.

Caſe 730.

Anonymous.

Award of mutual releaſes not good.
Ante, p. 130. *acc'.*

CASE upon three ſeveral promiſes, and an award orde tual releaſes pleaded in bar.

PER CURIAM. No good plea, becauſe nothing is awa bears an action; but if there were any thing awarded, which an action would lie, it would be a good plea, t were not performed.

And judgment was given for the plaintiff.

An

Anonymous. Case 731.

)LT, *Chief Juſtice.* We never make a rule upon a ſheriff to make a particular return. Return.

Anonymous. Case 732.

)LT, *Chief Juſtice.* Though inquiſition of forcible entry be quaſhed, yet reſtitution is not of courſe, contrary to n. 85. Forcible entry.

* [424]

More *againſt* Watts. Case 733.

'ATTS was brought in upon *habeas corpus*, before the return of a *capias* in *withernam*, upon an *elongatur* returned upon *mine replegiando*; and offered to plead *non cepi*, and give

If to a *homine replegiando* the ſheriff return *elongatur*, and a *capias in withernam* iſſues, but before its return the party is brought in upon a *habeas corpus*, he may plead *non cepi*, and *give bail* for his appearance on the return of the writ.

ower urged that he ought to be received to do it; for that a civil action only for recovering of damages for the taking letainer, and likewiſe to procure the party his * liberty; and he *capias* in *withernam* was like proceſs of outlawry upon mean ſs, the end whereof is to put in bail to the original action; and vere not ſo, this proceſs might be made a ſnare for people's liber- This writ of *capias* in *withernam* is no writ of execution; and an have no action of falſe return againſt the ſheriff: *Firſt*, Be- the *elongat'* is grounded upon an inquiſition. *Secondly*, If he ot replevy the party, he can make no other return; for he is not ce upon himſelf to falſify the ſuggeſtion of the writ. After a ntment of a GRAND JURY, the party ſtill ſtands *reſtus in* , and may traverſe it; *à fortiori* the ſheriff's return of an *atur* ought not to be concluſive; and he quoted the caſe in *ol. Ab.* 462. that though ſheriff returns outlawry of felony, yet party may aver, that he appeared at the fifth county.

S. C. 2. Salk. 581.
S. C. Holt, 626.
S. C. Lilly, Ent. 293.
S. C. 1. Ld. Ray. 613.
2. Show. 218. 221.
6 Mod. 84.
7. Mod. 9.

it that caſe was denied to be law by THE COURT.

OUNTAGUE *contra.* This is not a civil action for damages, o have the party enlarged, but is ſuch a proſecution in which lefendant, if convicted, ſhall be fined and pilloried: and the command of the writ is, that the defendant ſhould lie in gaol arty be ſuffered to be replevied by him; the words are "*donec eſat' M. ſecundum legem et conſuetud' Angliæ replegiari poſſit.*" e are no precedents that we can find of bailing in this caſe; are many in a *homine replegiando* for a villein, where the n was bailed, and the lord ordered to make a return. And ioted the *Lord Gray's Caſe* in king *Charles* the Second's (*a*), where the defendant, upon *elongat'* returned and award *ithernam*, came in, and was fined; and having obtained his n, moved to be bailed; and upon this the Judges aſſembled, ield, that the return was concluſive, and that he could not

(*a*) 6. State Trials, App. 16. Raym 473. Skin. 61 76. 81.

More *againſt* Watts.

be bailed; but might have a falſe return againſt the ſheriff, if he had wronged him; and if that remedy failed by death of ſheriff, they held, there might a commiſſion iſſue for the taking an inquiſition of the fact, which, if found againſt him, he might traverſe and try by jury, and ſo he had a means to diſcharge himſelf. And he compared a *capias* in *withernam*, in this caſe, to a *capias ad ſatisfaciendum*, both being with a *quouſque*.

HOLT, *Chief Juſtice*. The caſe of the outlawry is much a ſtronger caſe, for that is for a default in him in not appearing before; and ſurely the caſe you cite is very hard to maintain, and the reaſon they grounded themſelves upon wrong, *viz.* that the party was concluded by the ſheriff's return of an *elongat'*; and
* [425] * we have two records of a *non cepi* pleaded after an *elongatur*; and ſo has the law been holden ſeveral times ſince, and iſſues tried thereupon. And this is no criminal proſecution, for the king cannot have it, and damages are always given in it.

GOULD, *Juſtice*, ſaid, *ac etiams* have been added to ſuch writs.

Ante, p. 36. Suppoſe he had come before the *elongat'* returned, and entered an appearance, and after *elongat'* had been returned, there ought to be no *withernam*; and if one had gone, it ought to be ſuperſeded upon pleading *non cepi*, without any bail. And it is againſt all reaſon, that they ſhould be eſtopped by the return to ſay that they have not taken him. There is no diverſity between a *homine replegiando* and a *common replevin* for cattle. And if upon *elongat'* in replevin for cattle, the defendant come and plead a *non cepi*, it ſhall ſuperſede a *withernam*; and ſo is *F. N. B.* And if we conſider upon what matter the writ is grounded, it will appear to be a matter within the ſheriff's knowledge; for the writ ſuppoſes the cattle or party to be taken, and the ſheriff does not know whether it be ſo or not; and if he finds them not, to replevy, he can make no other return but an *elongatur*; and that puts an obligation upon the defendant to come into court and diſcharge his perſon or cattle from a *withernam*, by pleading *non cepi*. And it has been reſolved ſince my *Lord C.'s* time, that one might plead a *non cepi* after *elongat'* returned; and a *withernam* is but a mean proceſs grounded upon the return of *elongat'*, and the iſſuing of it cannot make the thing worſe than the return had made it; and there never was any law againſt bailing one on mean proceſs. But here you come in too ſoon, for you cannot plead till the writ be returned, nor bailed till after plea pleaded; when you appear on the return, you
Ante, p. 396. ought to move for them to declare, for they are demandable at the return, as upon an appeal; and if they do not appear, they ſhall be nonſuited, and the defendant diſcharged, and the plaintiff put to a new writ. If defendant in replevin come in on the replevin, he need not *gage deliverance*; but if he come not in upon the
Vide ante, 36. Raym. 474. replevin, but upon a further proceſs, he muſt *gage deliverance* in ſome caſes; and he utterly condemned the caſe in *Raymond*, before cited. Here is a charge and a denial, ſo the matter is indifferent; and

nd if the defendant appear on the *pluries homine replegiando*, and lead *non cepi*, he ſhall not need to give bail; but if he come pon the *withernam*, he may plead *non cepi*, but muſt give bail, hich is in the * nature of gaging deliverance; *vide* 12. *Ed.* 4. 4. Jpon a *non cepi* on return of the replevin, the defendant is in ourt without bail; but if he comes in cuſtody, there muſt be bail; e words of the book are, "he muſt continue in cuſtody," and at is in bail. And here, becauſe he could not be bailed before lea, and that he could not plead before a declaration, which could ot be till the writ was returned; it was offered for the defendant accept a declaration as of the return of the writ, but denied.

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And here THEY HELD CLEARLY, that no action of falſe return ould lie againſt the ſheriff for returning an *elongat'*, in any caſe, here he cannot have ſight of the thing to be replevied, becauſe : can make no other return; but if ſuch an action could have lain, e taking an inquiſition would not have prevented it; for it is t a ſheriff's taking an inquiſition where it does not lie, will pro- & him from an action. And in an appeal for murder, after return the writ, we bail, nay and give time to plead, ſometimes.

No action of falſe return will lie againſt the ſheriff on return of *elongat.* where he could not ſee the things to be replevied. Ante, 417.

At the day of the return of the writ the defendant was brought again;

Poſtea, 429.

And HOLT, *Chief Juſtice*, ſaid, he muſt plead a *non cepi* in per- n in court, and the bail muſt be in a ſum certain, and in the ture of gaging deliverance, *viz.* that the defendant ſhall appear *die in diem* till judgment; and in caſe return be awarded, that : ſhall reſtore the party to his liberty, and pay all coſts and dama- s, or ſurrender his body to priſon. And he quoted the *caſe of ela Baſtille*, (*a*), who came in on the return of *elongatur*, hereby the *withernam* was adjudged ſuperſeded; and that of *urville*, who came in on the very day on which the *homine plegiando* was returnable. And I never doubted, but a defendant ight plead a *non cepi* on the return of a *withernam*; for otherwiſe : would be in perpetual impriſonment, and that would be hard.

Bail muſt be in nature of gage deliverance.

Non cepi may be pleaded on return of *withernam*.

IT IS OBJECTED, that the plaintiff ought to declare in perſon; d that he cannot now do, becauſe we ſay the defendant keeps n his priſoner.

I ANSWER, In this caſe, they that ſued the writ for him may neceſſity declare for him, and the declaration is always *adhuc inet*; and if in any caſe the plaintiff declared in perſon, it muſt where he was replevied, or where the defendant brings him h him into court as his villein.

T IS OBJECTED, that he ought to be in cuſtody till the iſſue is d; as where cattle are replevied, the plaintiff has them in his ſſion till the cauſe be determined. 11. *H.* 4. 10.

(*a*) Ante, 36. Carth. 286. Comb. 200.

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* I answer, 7. *Ed.* 4. 15 Upon the *pluries*, *elongat.* was returned, the defendant appeared; a *withernam* is awarded, and that ſhould not have been; and therefore a *ſuperſedeas* was ſent to the ſheriff, becauſe the *withernam* iſſued erroneouſly; upon the *ſuperſedeas* the ſheriff returned, that before the coming thereof he had delivered the defendant's cattle to the plaintiff *in withernam*; and that as ſoon as he received the *ſuperſedeas* he came to the plaintiff, to make reſtitution, but that he had eloined the cattle; and thereupon the defendant prayed a *withernam* againſt the plaintiff, and had it. And where the defendant appears, and pleads *non cepi*, or claims property, there never ought to go a *withernam*; but that writ only goes where the thing cannot be replevied, and defendant will not come and plead.

If defendant appears on the *pluries*, no *withernam* to go.

It is objected, that the writ in the *Regiſter Orig.* 79. commanding the ſheriff to enlarge the lord taken in *withernam*, upon his producing the villein to be replevied, would be uſeleſs, if that be ſo.

I answer, That writ is to enlarge the lord, upon his ſuffering the villein to be replevied; before the day of return he is to be enlarged by that writ, which otherwiſe the ſheriff could not do, as he thought, or at leaſt would not. Indeed, if the defendant come in upon the day of *pluries* returnable, or return of *elongat.* and avow, or plead other plea, which puts not an end of the matter, there may be room for a *withernam*; but if he plead *non cepi*, or claim property, which puts an end to the matter, ſuch plea is a *ſuperſedeas* of the *withernam*. And where he denies the taking, there is no reaſon why he ſhould be impriſoned till that be tried; for there is only a bare affirmation to charge, and there is his negation againſt it; ſo the matter ſtands indifferent, and the ſheriff's return does not ſtrengthen the matter a whit; for he cannot help making ſuch a return, where he finds not the thing to replevy.

It is objected, The command of the writ is to detain *quouſque* he ſuffers plaintiff to be replevied.

The *alias* in replevin in nature of a *juſticies*.

I answer, True, the ſheriff cannot diſcharge him *quouſque* that be done; the firſt and *alias* in replevin are only in nature of a *juſticies* impowering the ſheriff to hold plea of the matter by replevin in the county, and the *pluries* is the original on which plea is holden in the courts above; and the firſt and ſecond are not returnable, but the third is returnable upon the ſheriff's default of holding plea upon the *juſticies*; and that after *elongat.* returned, the defendant * may plead a *non cepi*; *vide Kel.* 71. *N. B.* 74. And if cattle be taken in *withernam*, by way of execution in replevin, the plaintiff thereby gains an abſolute property in them in lieu of his own; but not ſo where the *withernam* is a proceſs. If one declares in replevin for cattle with an *adhuc detinet*, and defendant has judgment againſt him for damages, by payment thereof the property of the diſtreſs ſhall be veſted in him; but in a

* [428]

If cattle be taken in *withernam* by way of execution, in replevin, plaintiff has property; but not where it is but a proceſs.

re replegiando, though he plead a *non cepi*, and upon that found ıſt him, judgment be for damages againſt him; yet the ty of man is ſuch, that thereby he can gain no property there- ıut a *capias* will go againſt him, and he thereupon ſhall be in *withernam*; and the precedents in *Raſtall* upon this head, ıot to be depended on. If a *homine replegiando* be brought, he defendant claim the party as his villein, that will be a good n for the ſheriff to make; and there ſhall be no replevin till tiff give ſecurity, and that in court; and then there ſhall go it, reciting the ſecurity entered into in court, to the ſheriff to er the plaintiff; and when the plaintiff comes in upon that ity ſo entered into in court, he is not at large, but to find ſecurity, that he ſhall appear from day to day, pending the ; and that if judgment go againſt him, he ſhall render him-) the defendant, and he takes him out of court. *Vide* 8. *Hen.* F. "*Mainpernor*," 21. 32. *Hen.* 3.

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hen a defendant comes in upon a *capias* in *withernam* and led, that is but an eaſing of the cuſtody he was in upon the till the matter be tried; and then if the iſſue be againſt him, I think, to render himſelf into cuſtody again, and then he y virtue of the *capias* in *withernam*: Like the caſe of *audita* by one in execution; if it be upon a deed, nonage, or the the Court does bail the plaintiff, upon condition of a recog- ce to pay damage, or render his body to priſon; and if the be againſt him, and he render himſelf to priſon, he ſhall be ın the firſt execution; and ſo he will here, by virtue of the in *withernam*. But ſuppoſe he does not render his body in tion, can the Court award another *withernam*? And I think ; and it is like, where a man is bailed upon an appeal of r to appear from day to day, if he make default, it ſhall be led, and proceſs ſhall go againſt his bail, and a *capias* againſt f; and if he do not make default, but come in diſcharge of il, he ſhall be committed as at firſt. But ſuppoſe in replevin lant appear at the *elongat.* returned, * and plead *non cepi*, is found againſt him, what ſhall be done then? There ıe judgment, and a *withernam* thereupon; and the reaſon is, ſe a pleading a *non cepi* upon the *elongat.* is a *ſuperſedeas* of *ithernam* at firſt, and that is after falſified by the verdict, thereby takes off the *ſuperſedeas*, and then the matter is for a *withernam*. And it is like the caſe of *IV.* 2. *c.* 46. by a writ of inquiſition iſſues out of chancery, returnable o inquire of maleſactors throwing down inclolures *nocłanter*, ıd upon return thereof a *diſtringas* ſhall go to ſummon the ıt vills to repair, and to inquire of the miſchief, and to com- the ſaid vills to make reſtitution; and the writ in that caſe ɔrds of execution in it to levy the damages found, and to hem into court; yet becauſe it gives a day to the adjacent come in and plead, they may come, and either traverſe the ion, or demur to it, and till that be tried proceedings ſhall

If one is bailed in *withernam*, and the iſſue be againſt him, he is to be rendered to cuſtody.

2. Cr. 67. Yelv. 59.

* [429]

If *non cepi* be pleaded, and found againſt him, judgment ſhall be, and *withernam*.

Caſe 734.

Anonymous.

Perſon of ill fame not bailable.

HOLT, *Chief Juſtice.* A perſon of ill fame is not bai the ſtatute of *Weſtminſter the Second.*

See Hawk. P. C. 3. vol. ch. 15. ſ. 40. 44. 3. Bulſt. 113.

Caſe 735.

Anonymous.

The Maſter may examine *ex parte.*

HOLT, *Chief Juſtice.* When a matter is referred MASTER of the office to examine, and a ſummons o vice of the rule to the party, if he will not attend, THE M may examine *ex parte* without motion.

Caſe 736.

Anonymous.

HOLT, *Chief Juſtice.* One is not to be heard for one tempt, or convicted, without his client be in court.

* [432]

Caſe 737.

* Hemming *againſt* Price.

Suit may be in the ſpiritual court againſt a woman for incontinency after the death of the man, whom ſhe ſuggeſted to be her huſband.

S. C. ante. 419.

S. C. Holt, 457.

SHE was libelled againſt in the ſpiritual court *ex officio*, fo tery with one now dead, by whom ſhe had children and having pleaded below, that ſhe was married to him, it plied, that ſhe had a former huſband then living.

A prohibition was moved for, ſuggeſting the matter plea.

It was urged, that by ſentencing her, they would in effe tardize the iſſue, which ought not to be after the death of the parties.

HOLT, *Chief Juſtice.* Do you think that if a man and man cohabit together, and have iſſue, and one of them di that ſhall protect the other from being proceeded againſt ſpiritual court for fornication? and this ſhall not baſtardi iſſue, for he was a baſtard without any proceedings of theirs, parents of it were never married. The meaning of the that one ſhall not be baſtardized after the death of either parents, is, that the ſpiritual court ſhall not proceed to diſ marriage *de facto* after the death of either parties, as in consanguinity, precontract, &c. but in this caſe, if the repli below be true, the marriage was *ipſo facto* void. *Vide Caſe (a)*, Adminiſtration was committed to a woman, as of *J. S.* and a libel was in the ſpiritual court to repeal the niſtration, upon ſuggeſtion that *J. S.* had a former wife livi the time of his death; and there indeed a prohibition was gr

It is only a marriage *de facto*, which ſhall not be avoided after death in the ſpiritual court.

(*a*) 7 Co. 42, 43. b. 44. a. Same caſe under the title of Robertſon v. Stallage, Cro. Jac. 156. Jenk See alſo Styles Rep. 16.

MORE *against* WATTS.

ot take notice of his being in cuſtody in any caſe, but where he *in cuſtodiâ mareſchalli*, though he be actually in gaol. But the earer and better way of declaring will be to ſay thus, "DOMINUS REX *mandavit vicecomiti breve ſuum, &c.*" and ſo ſet forth the hole replevin, return, *withernam*, and the return thereof; of which e a precedent in *Raſt.* 560. in replevin for cattle. And this is e better way, becauſe the whole matter will appear on record; the common pleas they only recite the ſubſtance of the writ, t here in this court it is ſet forth *in hæc verba*.

IT IS OBJECTED, that here they cannot make an attorney for e plaintiff, and he is not to be found to make one for himſelf.

I ANSWER, Since the law enables him to ſue this writ by ends, it will of conſequence enable them to make an attorney r him.

But another doubt was, whether the plaintiff being an infant, e ſhould proſecute by attorney, or *prochein* * *amy*; *ad quod non uit reſponſum*. And here the writ being againſt three, one where- f only was brought in, it was doubted by the plaintiff how they uſt declare; to which it was anſwered, they muſt do as if it ere in an appeal, declare againſt him that appeared, and continue roceſs againſt the others.

* [431]

Where the writ is againſt ſeveral, muſt declare againſt thoſe who appear, and have proceſs againſt the others.

And HOLT, *Chief Juſtice*, ſaid, it would be a queſtion whether he plaintiff ſhould not be put to find pledges; but at laſt the laintiff was demanded, and would not declare, and ſo was nonſuit- d, and the defendant diſcharged.

If plaintiff is demanded, and will not declare, ſhall be nonſuited.

NOTE; While this caſe was under conſideration, HOLT, *Chief Juſtice*, ordered MR. CLERK *the ſecondary* to prepare a draft f the recognizance which the bail were to give; which he did; nd after great conſideration HOLT, *Chief Juſtice*, ET CURIA, pproved of this that follows:

" *Et ſuper hoc vener. hic in cur. dict. domini regis coram ipſo rege A. B. et D. et manuceperunt, et quilibet eorum manucepit pro præfat.* D. WATTS *ad habend. corpus ejus coram domino rege apud præfatum tru. et ſic de die in diem quouſque judicium inde redditum fuerit. Et ſi continget quod idem* D. W. *convincetur, quod tunc ipſe præfat.* D. WATTS *ſe priſonæ mareſch. mareſch. dicti domini regis coram ipſo rege in withernam reddet ibid. moratur. donec præfatum W. M. e cuſtodiâ ſuâ deliberabit, et ad largum quo voluerit, ire permittet; vid. quilibet manucaptorum præd. in hac parte ſub pœna quingent. librarum, quam quidem ſummam quingent librarum iidem manucaptores concedunt, et quilibet eorum concedit de terris et catallis ſuis et eorum cujuſlibet fieri, et ad opus præd.* TH. M. *levari, ſi continget præd.* D. WATTS, *ad præfatum tru. ſeu aliquem alium diem per Cur. domini regis hic in præmiſſ. præfix. aut præfigend. perſonaliter non comparere, aut ſi continget judic. verſus præf.* D. WATTS *in hac parte reddi et præf. D. ſe dict. priſonæ mareſch. ea occaſione non reddere.*"

Anonymous.

No one can preach without licence from the ordinary. Lind. 288.

And HOLT, *Chief Juſtice*, further ſaid, that let a par ever ſo orthodox and able, yet he is puniſhable for his pr tion, if he preach without licence of the ordinary; but th nary *ex debito juſtitiæ* ought to give ſuch licence to one fit; but if he refuſe, no *mandamus* will lie, but his remed appeal.

Caſe 739.

* Roſiere *againſt* Sawkins.

When *a maſter* is appointed to the command of a ſhip, he, and not *the owners*, has the right of appointing *officers* and *ſailors* to the ſhip, unleſs it be otherwiſe ſpecially agreed between them. S. C. ante, 399. S. C. Holt, 460.

TRESPASS by the maſter for a battery on the ſerva *quod, &c.*

The defendant pleads, that the plaintiff and three mor owners of a boat for conveying of paſſengers between *L.* a and they conſtituted the defendant maſter of it; and that f the ſaid ſervant on board *damage feaſant*, he took him and t him out.

The plaintiff replied, that being part-owner, he comm him to go on board and ſerve there.

To which the defendant demurred.

And adjudged *pro defendente*; for when the part-owne made the defendant maſter, they could not put any ſervants him without a ſpecial agreement for it, for breach whereof a tion would lie; for the very making him maſter impowers h chooſe his ſervants, for he is anſwerable for all events, and fore but reaſonable he ſhould have liberty of chooſing ſuch m he can confide in, and for whoſe honeſty and diligence h take ſecurity; and the owners have no means to avoid it recall the maſter's authority; and it is one of the inconveni of jointenancy, that one alone cannot do that.

Jud. pro defendente.

Caſe 740.

Anonymous.

Information.

INFORMATION was filed againſt a gaoler for ſuf one taken up upon an *excommunicato capiendo*, to large.

Caſe 741.

Snow *againſt* Firebraſſe.

A declaration for board and lodging for *ſeveral months* is ſufficiently certain *after verdict.*

QUANTUM MERUIT on a ſpecial promiſe, that when plaintiff, at the requeſt of the defendant, did find the d ant with meat, drink and lodging for ſeveral months, he pro to pay him what it was worth.

After verdict

IT WAS MOVED *in arreſt of judgment*, that the declaratio too incertain for the time.

but being after verdict it was held well, as *indeb. pro diverſis dimoniis*, eſpecially being executed.
Judgment was given for the plaintiff.

SNOW *againſt* FIREBRASSE.

* [435]

* Blaxton *againſt* Honore.

Caſe 742.

PARNELL urged, that if it appear on the face of the libel, that the eccleſiaſtical court has no juriſdiction, they may be proited without ſuggeſtion.

Prohibition not to go to the ſpiritual court without ſuggeſtion.

But CURIA *contra*; for the ſuggeſtion is a fundamental point, is the declaration on the writ (*a*).

) Vide 2. Inſt. . 12. Co. 63. the complaints of ſpiritual courts common-law courts were ex- ; and the great care of the Judges in requiring ſuggeſtions before they would grant a prohibition, much admired.— NOTE *to the former edition.*

The King *againſt* Purſey.

Caſe 743.

An INDICTMENT (*a*) was, "that *A.* uſing the trade of buying and ſelling cattle, at *B.* in the county of *M.* did buy and poſe to ſale bad cattle, &c."
and it was quaſhed for incertainty; for PER CURIAM, If it be ſtood that the buying and ſelling was "at *B.* in the county *M.*" there is no *venue* where the expoſing to ſale was; and *B.* in the county of *M.*" be applied to the place of ſale, there place laid where the uſing the trade was; ſo *quâcunque viâ* be impoſſible to make it good.

An indictment "that *A.* uſing "the trade of "ſelling cattle "at *B.* in the "county of *C.* "did ſell bad "cattle, &c." is bad for uncertainty.

(*a*) This indictment was filed in Eaſter Term, 10. *Will.* 3. Roll 42.

Anonymous.

Caſe 744.

PER CURIAM. When exception is taken to bail, there ought to be notice of it to the defendant's attorney.

Notice.

Anonymous.

Caſe 745.

WHEN one is removed hither by *habeas corpus*, and turned over, there is a *committitur* ſent over to THE MARSHAL him, and that ought to be brought back and filed in the of- and let that be obſerved.

Committitur on *hab. cor.* ought to be returned and filed.
Ante, 423. 430.

Anonymous.

Caſe 746.

HOLT, *Chief Juſtice.* One charged with buggery not bailable.

Buggery.

Anonymous.

Caſe 747. **Anonymous.**

Coſts. HOLT, *Chief Juſtice.* When proceedings are ſet irregularity, there ſhall never be coſts.

Caſe 748. **Adams *againſt* Arnold.**

Breach. ACTION upon ſeveral promiſes; and in aſſigning th it was, "*et præd.* ADAMS the plaintiff *non, &c.*" murrer, judgment was given for the defendant.

*[436]

Caſe 749. *** Dubois *againſt* Trant.**

Adminiſtration committed to one *durante minoritate* of an executor, whether on his dying under age it may be repealed, and committed to the reſiduary legatee.

4. Burn's E. L. 236.
1. Com. Dig. "Adminiſtrator" (B. 8.).
6. Com. Dig. "Prohibition" (G. 18.).
2. Eac. Abr. 410.

A. By will deviſed eight hundred pounds to his wife, an reſidue of his perſonal eſtate to his ſon, an infant, came to the age of twenty-one years, with proviſion for cation in the *interim*; and if the ſon died under age, the to his nephew, who was likewiſe under age, upon the ſa tingency; and if he died under age, the reſidue to the *Dubois*, who now ſued in the ſpiritual court.

The teſtator made his ſaid ſon executor, and died; adm tion *durante minoritate* was committed to the mother. died inteſtate; the nephew continuing under age. *Du* contingent reſiduary legatee, in caſe the nephew died un being alſo next of kin to the nephew, libelled againſt the to have her adminiſtration repealed.

And *a prohibition* was moved for, for theſe reaſons:

FIRST, Executors and adminiſtrators are officers in the teſtator and inteſtate; and as the ordinary cannot ch executor appointed by the party, ſo now ſince the ſt 31. *Edw.* 3. c. . and 21. *Hen.* 8. c. 5. it is directed t adminiſtration ſhall be committed; and when once the has executed his authority (for ſince the ſtatute he has n the adminiſtrator has the ſame abſolute property that an e has; and the ordinary ſhall not interfere (*a*). It cannot be but the wife here was next of kin to her huſband and b who was reſiduary legatee, and who, as ſuch, ſhould hav niſtered if he were of age, if the father had died inteſtate.

SECONDLY, An adminiſtrator is a temporal officer, of the common law takes notice; and though the cuſtom realm allows the ordinary to create him, yet he cannot him after.

(*a*) See Harriſon v. Weldon, 2. Stra. 911. S. C. Fort. 363. that the ordinary cannot be ſaid to have executed his authority if he never had an opportunity to make the election, which the 21. *Hen.* 8. c. 5. gives him; and in ſuch caſe he may revoke an admin granted.

THE

IIRDLY, The inconveniency would be intolerable, if the ıry had ſuch a power to repeal; for he might do it in the of a ſuit by a creditor againſt him, and ſo abate his ſuit, to eat vexation of creditors; or it might be in the midſt of a an adminiſtrator, to recover aſſets to diſcharge juſt debts, great waſte of aſſets, and likewiſe to the great prejudice of ors.

Dubois *againſt* Trant.

URTHLY, It is frequent with them to grant adminiſtration a limitation or condition; which ſhews, that in their own ons, they cannot revoke; for otherwiſe, what need they grant upon condition?

Poſtea, 443.

WHICH *it was anſwered*, that moſt clearly an adminiſtra- nay be revoked, but in what caſes is the queſtion; and this ity was put, that regularly, when the * ſtatute of 21. *Hen.* 8. s rightly purſued by the ordinary, he cannot afterwards revoke dminiſtration granted according to the ſtatute; and in that he adminiſtrator gains an abſolute indefeaſible intereſt therein. where he does not purſue the directions of that ſtatute in ing adminiſtration, he gives indeed an intereſt to the admi- tor, but a defeaſible one, and ſuch as may be after repealed; here be two in equal degree, or wife and next of kin, there s election to which of them to grant it; and therefore if he it to one of them, he ſhall not avoid it; but if, intending to it to the next of kin, he ſhould grant it to one more remote, ıy after revoke it at the ſuit of the next of kin. *Vide* 1. *Sid.* 409. Then it muſt be admitted, that the right of adminiſ- n is now in the infant reſiduary legatee; and this they admit ir ſuggeſtion, that ſhe has adminiſtration in truſt for the in- reſiduary legatee, to whom ſhe is not next of kin; ſo the e queſtion is, Whether adminiſtration, which a reſiduary ee ought to have, if he were not under age, can be well and ocably committed to one that is not next a kin to him? *Vide* 372. 1. *Vent.* 317. 1. *Sid.* 280. that right of adminiſ- n belongs to the reſiduary legatee by the equity of the ſtatute; the matter is no more than this, that the biſhop gives the cu- ſhip of this infant to her, and why may he not take it from gain, if he ſees occaſion? for it is no diſturbance of the right, hat always remains in the infant; and it is like a guardian inted by the court of chancery. And it would be very in- enient, if when the right of adminiſtration is in one, who, in ſt of infancy, is incapable of adminiſtering, and the ſpiritual t grants it to another, if they ſhould not have power to revoke on occaſion; for otherwiſe the adminiſtrator might waſte all ſtate of the infant. By the ſtatute of 21. *Hen.* 8. c. 5. ſ. 3. 22. & 23. *Car.* 2. c. 3. upon granting adminiſtration, the ary ought to take a bond, &c. which is not done here, there- e has not purſued his authority; *ideo* adminiſtration not ab- . If adminiſtration be granted to a perſon then ſolvent,

* [437]

Where directions of the ſtatute are purſued, adminiſtration cannot be repealed; but where they are not, may revoke.

2. Stra. 1137.

compos

DUBOIS *against* TRANT.

compos mentis, or within communion of the church, who after becomes insolvent, *non compos*, or excommunicate, shall it not be repealed? *Vide* 3. *Keb.* 124. 131. 282.

Where there is an executor under age, administration shall be committed to the residuary legatee.

Ante, 306.

HOLT, *Chief Justice.* Where there is an executor under age, if there be legacies, the residuary legatee ought to have * administration *durante minoritate*, and not the next of kin to the intestate; because that by the statute of 31. *Edw.* 3. it is to be committed to the most loyal and next friend of the intestate; and the making a residuary legatee in such a will is a manifest indication that such a testator took that person, whom he has so made, to be his next friend. If a *feme covert* die intestate, leaving divers debts due to her before coverture, and administration is committed to her brother, or other next of kin, it shall be repealed and granted to her husband; and that has been so adjudged in the common pleas, in the case of *Duncomb v. Mason (a)*. But the principal case is very considerable: there was the like point in *Chief Justice* PEMBERTON's time, and a prohibition granted, but the point not determined: Most certainly, by this grant of administration, an interest is granted and vested in the administratrix. If administration be granted to a creditor, and afterwards a more principal creditor comes, it shall not be revoked for him; and it may be here, *factum valet fieri non debuit*. Before the statute of *Edw.* 3. the administrator was but a mere servant of the ordinary removeable at pleasure, but since he has the absolute property. Indeed an administrator *durante minoritate* shall do nothing to the prejudice of the executor; and there is a diversity, in point of determination, between an administrator *durante minoritate* of an executor, for that shall only endure till the executor comes to seventeen, at which age he may act as executor; and grant of administration *durante minoritate* of *J. S.* for that shall hold till he comes to twenty-one (*b*).

* [438]

2. Jo. 225
2. Cro. 201.
2. Lev. 55.
2. Vent. 217.

1. Jo. 228.

GOULD, *Justice*, *accord.* and it is hard to maintain, that a grant of administration to one during the minority of one that has right to administer, is a bare authority.

Postea, 445.

And HOLT, *Chief Justice*, AND OTHERS, at another day, It is a point worthy of consideration, and much may be said to prove that the ordinary has executed his authority; therefore let prohibition go, and declare immediately.

(*a*) 1. Ld. Ray. 685. See also Fawtry *v.* Fawtry, 1. Salk. 36. S. C. 1. Show. 351. S. C. Holt, 42. Rex *v.* Bettesworth, 2. Stra. 891. 1111. 1113. and the statute 29. Car. 2. c. 10.

(*b*) See Freake *v.* Thomas, 1. Salk. 39. S. C. 1. Ld. Ray. 667. S. C. Comy. 110. S. C. under the title of Reek *v.* Thomas, post. 500. Atkinson *v.* Cornish, 1. Ld. Ray. 338. S. C. Carth. 446. S. C. 5. Mod. 395. S. C. ante, 194. S. C. Comb. 475. S. C. Holt, 43. Jones *v.* Lord Strafford, 2. Bac. Abr. 382.

Anonymous.

Anonymous. Caſe 750.

', *Chief Juſtice.* By outlawry, a leaſe for years is for- By outlawry a leaſe is forfeit before ſeizure. Ante, 176.
d before any ſeizure; and therefore if it be ſold after Hard. 101. Raym. 17.
and before ſeizure, the king ſhall avoid the ſale; but if
ved ſell an eſtate in fee before ſeizure, the ſale is good,
ng ſhall not have the pernancy of the profits; but if the
er ſeizure, the ſale ſhall hold, but the king ſhall have
ıcy of the profits; but even in caſe of a leaſe there ought
ffice found for the king. *Vide Cro. Jac.* 82.

HILARY TERM,

The Twelfth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Lyttleton Powys, *Knt. (a)* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

(a) *Sir* LYTTLETON POWYS, *Knt.* was removed from the Court of Exchequer to a ſeat in the Court of King's Bench, on the twenty-eighth of Jan in this Term.

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* [439]

Caſe 751.

* Anonymous.

Sale by a bankrupt to a *near relation* is a badge of fraud.

UPON A QUESTION, Whether a conveyance made by bankrupt, a ſhort time before act of bankruptcy committed, were fraudulent or not? theſe points were agreed the Court:

FIRST, That the ſale being to a near relation of the party was ſome mark of fraud, though not a concluſive one; becau relations might be real creditors, or give a valuable conſideratio

Non payment of money on executing a bill of ſale is evidence of fraud.

SECONDLY, The non payment of money at the time of e cuting the deed is another (*a*).

Bill of ſale ſpecifying the money paid, evidence of *bona fid.* conveyance.

THIRDLY, It is ſome evidence of a *bona fide* conveyance, the deed mentions money paid; but that had need of other co borating circumſtances, as enjoyment.

1. Stra. 1:4. 2. Stra. 1:19.

(a) See the caſe of Martin v. Pewtreſs, 4. Burr. 2478. Worſley v. De Mattos, 1. Burr. 467. Wilſon v. Day, 2. Burr. 827. Butcher v. Eaſto 282. and ſee Cooke's Bankrupt L 3d edit. 106. 109.

Anonym

Anonymous.

Caſe 752.

CURIAM. If there be evidence of both ſides, and ver- Cauſes for granting new trials.
t againſt the ſtrength of evidence, if ſuch trial be not pe-
ry, there ought not to be a new trial.

eral cauſes of new trials are, want of due notice, practice or
eanor in jury, in either party or their agents; the abſence
material witneſs which they could not then have; verdict
evidence, exceſſive damages, &c. (*a*).

RE, In many caſes, upon granting of new trial, the former
ought to ſtand as a ſecurity; for otherwiſe the party, againſt
it paſſed, might ſpirit away the evidence on whoſe teſtimony
obtained; and ſo, without any corroboration of his right,
him of the benefit of his verdict.

r the ſeveral grounds on which
t will grant new trials, ſee 1. vol. of Mr. Sellon's Practice, 507 to 516.

* Grant *againſt* Baily.

Caſe 753.

ATE of a ſhip libelled in the admiralty court for his wages; The mate of a ſhip may ſue in the admiralty.
d prohibition moved for by RAYMOND.

agreed PER CURIAM, It ought to go in caſe of a maſter; S. C. Salk. 33.
caſe of mariners; and the mate being a mean between S. C. Holt, 48.
t was doubted. But THE COURT inclined to conſider him S. C. 1. Ld. Ray. 632.
riner, becauſe he is hired by the maſter, as other mariners; 1. Vent. 246.
maſter is put in by the owners. And afterwards, upon 343.
nce with the common pleas, where a like caſe was under
ration, ruled that no prohibition ſhould go (*a*).

e accordingly Marſh *v.* Allenſon, 181. Hook *v.* Moreton, 1. Ld. Clay *v.* Snelgrave, ante, 405. Sawkins, ante, 434. Read *v.* Chapman, Stra. 937. Ragg *v.* King, Stra. 858. and Wilkins *v.* Carmichael, Dougl. 101.

Anonymous.

Caſe 754.

CURIAM. The reaſon why an executor, defendant or Executor.
intiff, upon a nonſuit, ſhall pay no coſts, is, becauſe the
ng *in auter droit*, he may well be thought miſconuſant of
th of the cauſe of action (*a*).

ortman *v.* Carne, 2. Stra. 681. Yellowly, 2. Stra. 1106. But on this ſubject ſee Hullock on Coſts, 174, &c.

Anonymous.

Caſe 755.

CURIAM. One cannot change his attorney on record, An attorney on record not to be changed without leave of the Court.
thout leave of the Court; and after judgment the attorney
rd may receive and acknowledge ſatisfaction, by virtue of

ANONYMOUS. his former warrant; and when attorney of record is changed, the record ought ſpecially to mention that it was by conſent of the Court.

Caſe 756. The King *againſt* Sir Hugh Everard.

Pariſh may tax themſelves to carry on a ſuit for the public good of the pariſh.

A RULE was obtained by ſurprize, for leave to file an information againſt him, and ſeveral other pariſhioners of the pariſh of ——— in *Eſſex*, for laying a tax upon themſelves for carrying on a ſuit againſt their vicar in the ſpiritual court for incontinency.

And THE COURT held, they might lawfully tax themſelves, by conſent, to carry on a ſuit for the public good of the pariſh; but in that caſe the majority could not bind the reſt, without their conſent, as in caſe of other rates.

Vide ante, 154, 155. But the information being filed, it was referred to the Maſter of the office.

Caſe 757. Anonymous.

Statute rolls. HOLT, *Chief Juſtice*. Acts of parliament on the rolls are not diſtinguiſhed into paragraphs, but that is done by the printer.

* [441]

Caſe 758. * Anonymous.

Payment of debts by executor *de ſon tort*, is only in mitigation of damages. Poſt. 441.

HOLT, *Chief Juſtice*. Though an executor *de ſon tort* pay debts duly, with all the aſſets that come into his hands, yet the rightful executor ſhall maintain treſpaſs againſt him; but he may give ſuch payment in mitigation of damages; yet the right of the action and verdict ſhall go againſt him.

2. Bl. Com. 507, 508. 2. Term Rep. 100. 3. Term Rep. 590.

Caſe 759. Anonymous.

Matter in diſcharge muſt be ſpecially pleaded.

PER CURIAM. If a *ſcire facias* be returned "ſerved," and the defendant has an act of parliament for his diſcharge, and omits to come and plead it, he has for ever loſt the advantage of it.

Caſe 760. The King *againſt* Margaſon.

On *habeas corpus* rule may be to bring him up anyday the ſame Term, without filing it; *aliter* if to be in a ſubſequent Term.

MARGASON was committed to *Newgate* upon the ſtatute of 8. & 9. *Will.* 3. upon refuſal of paying ſuch money as was in his hands as collector of the taxes; and removed up by *habeas corpus* the laſt day of laſt Term.

And

nd then, *abſente* HOLT, *Chief Juſtice*, a rule was made to g him up the firſt day of this Term, without filing the re-

THE KING *againſt* MARGASON.

OLT, *Chief Juſtice*. Though ſuch a rule might well be for bringing one up, in a day in the ſame Term, without filing writ, yet it ought not to have been to bring him up at a day nother Term, without filing the return; for he cannot now brought up upon a writ returnable in a precedent Term, by a rule, without the return thereof be filed; therefore you muſt out a new writ.

nd this being a cauſe concerning the king's revenues, you beſt give notice to THE ATTORNEY GENERAL; for we t not to file a return of any ſuch matter removed hither, with notice to him.

In matter concerning the revenue notice to be given to the Attorney General.

Anonymous. Caſe 761.

OLT, *Chief Juſtice*. If covenant be to pay a ſum to a ſtranger, at ſuch a day and place, tender and refuſal is no ſe of non-performance (*a*).

Tender and refuſal.

(*a*) See Merrit *v.* Rane, 1. Stra. 458. Clarke *v.* Tyſon, 1. Stra. 504. Bul- *v.* Noke, 2. Stra. 579.

Anonymous. Caſe 762.

OLT, *Chief Juſtice*. A maſter cannot aſſign over his apprentice, as he may another chattel, but it muſt be with his conſent (*a*).

Apprentice aſſigned. Dalt. 58.

R. x *v.* Eaſtbridgford, 2. Stra. 1115. S. C. 133. Rex *v.* Barnes, 1. Stra. Wadſworth *v.* Executors of Guy, 216. Rex *v.* Channel, 3. Keb. 519. Rex *v.* Chaplin, Comb. 224. Caiſter *v.* Eccles, Ld. Ray. 683. Salk. 68. Holy Trinity *v* Shoreditch, 1. Stra 10. Baxter *v.* Benfield, 1. Conſt's P. L. 523.

Anonymous. Caſe 763.

OLT, *Chief Juſtice*. There needs no notice to the churchwardens, &c. of *a ſervant's* coming into a pariſh to gain a ment; becauſe the juſtices of peace, though there had been e, cannot diſturb him (*a*).

A *ſervant* need not give notice to gain a ſettlement.

See the ſtatutes 1. *Jac.* 1. c. 17.; & 4. *Will. & Mary*, c. 11. Rex e Inhabitants of Warminſter, 1. Stra. 470. S. C. Fort. 326.; Rex *v.* Portſmouth, 2. Stra. 746.; and the ſtatute 35. *Geo.* 3. c. 101.

* Anonymous. Caſe 764.

LT, *Chief Juſtice*. There is a diverſity between *pleas in ar* and *pleas in abatement*, as to time; for if one be to plead the eſſoin-day, ſuppoſe of *Michaelmas Term*, if he plead in time before *craſt. Animarum*, it is well; *ſecus* in abate-

Pleas in bar and abatement.

Caſe 765. West *againſt* West.

In amendment of declaration, the plaintiff may pay coſts, or grant imparlance.

S. C. 3. Salk. 276.
S. C. 1. Ld. Ray. 674.
S. C. Holt, 559.
S. C. Lilly Ent. 51.

PER CURIAM. Upon amending a declaration, the plaintiff has his election to pay coſts, or grant an imparlance. If he grant an imparlance, the defendant may plead *de novo*, for the imparlance ſets aſide his former plea. If he pay coſts, he is let in to plead again, ſo it be ſome new matter; for this reaſon, becauſe that it might be, the fault which the plaintiff amends was the occaſion of his pleading that plea; but there he ſhall not have liberty to plead the ſame plea over again; and if he plead *de novo*, it muſt be a plea to ſtand by; and if he will not plead a new plea, the old one muſt ſtand. After plea in bar, one cannot plead in abatement; and the amendment and imparlance will not let one in to do it.

Caſe 766. Anonymous.

An affidavit to charge the *venue* muſt fix it in ſome certain county.

Sellon's Pract. 261 to 267.
Tidd's Pract.

AN AFFIDAVIT for changing a *venue* was, "that the cauſe of "action, if any, did ariſe in the county of *L.* or in ſome "other than in that in which the plaintiff laid;" and it was inſufficient, for it ought to fix it to a certain county; and at this rate *venues* might be changed almoſt *in infinitum*.

Caſe 767. Anonymous.

Interrogatories.

WHEN ONE is put to anſwer interrogatories, the proſecutor has four days to exhibit, by the Rules of the Court.

Caſe 768. Anonymous.

If a ſhip be *loſt* or *diverted* between the ports of *delivery* and *deſtination*, the ſailors loſe their wages.

Ante, 408, 409.

PER CURIAM. In reſpect to ſeamen's wages, the uſage is, if the ſhip be loſt before arrival in the *port of delivery*, they loſe their wages out. If ſhe arrive ſafe in port, and is loſt in her homeward voyage, they have their wages out, but loſe the homeward wages. If they run away after arrival in port abroad, they loſe their wages.

* [443]

Caſe 769. * Gidley *againſt* Williams.

Debt on a bond as adminiſtrator, not ſaying by whom it was committed, aided by pleading *non eſt factum*.

S. C. 1. Salk. 37.

DEBT UPON A BOND by adminiſtrator, naming himſelf adminiſtrator of *J. S.* deceaſed, without ſaying "*bonorum et* "*tallorum, jurium et creditorum*," as the uſual courſe is, and without ſaying as much as "*cui adminiſtratio commiſſa fuit*," but concluding *profert in cur. literas adminiſtrat.* *Non eſt factum*, and verdict for the plaintiff.

S. C. 1. Ld. Ray. 634. Ante, 436. 1. Ld. Ray. 109. Comp. 825. 3. Term Rep. 4[illegible]

Ante

AND MOVED *in arreſt of judgment*, that the plaintiff had not de himſelf any title to the action. GIDLEY *againſt* WILLIAMS.

FIRST, Becauſe it was not ſaid *qui obiit inteſtat.*

SECONDLY, Not ſaid of what adminiſtration was committed to a, or of what the plaintiff was adminiſtrator, whether of his ods and chattels, debts, &c. and adminiſtration may be qualified of chattels real only, or chattel in poſſeſſion, and not of debts; debts, and not of debts by bond, &c. So it ought to appear at the plaintiff was adminiſtrator of.

THIRDLY, Not alledged that adminiſtration was committed to plaintiff, and by whom.

As to THE FIRST, It ought to have been ſaid *qui obiit inteſt.* at leaſt, that adminiſtration was committed to him, which ngly implies a dying inteſtate; and the diver ty of entries is erv ble, when an action is brought by an adminiſtrator, and en againſt him; in the one the allegation is abſolute, *qui obiit ſt*; in the other it is qualified, *qui obiit inteſt. ut dicitur*; and t be aſked, what it is that is the foundation of this action, it will anſwered to be the original bond, and the adminiſtration com- ted to the plaintiff; and if either fail, the action muſt fail: d a verdict will not help the want of that which is abſolutely eſſary to ſhew cauſe of action, and cannot be matter of evi- ce upon the iſſue. And for the neceſſity of ſhewing that ad- iniſtration was committed to the plaintiff, were quoted 2. *Vent.* 1. *Sid.* 228.

But PER CURIAM, after ſeveral arguments, The defendant, by ading in chief, has cured all the faults of the declaration, not- hſtanding the caſe of *Cope v. Lewin (a)*. 2. Cro. 124, 125.

And HOLT, *Chief Juſtice*, quoted the caſe of *Lord Mohun v. ber* in the common pleas, *Trinity Term* 1657, the report reof *penes ſe habuit*, and belonged to my LORD BRIDGMAN; as an *aſſumpſit* by an adminiſtrator, and no *profert* of *literas iniſtrat*; *non aſſumpſit* pleaded, and held that the fault was ed after plea; and the authority of the caſe of *Cope v. Lewin* ied. *Vide Denniſon v. Monſon (b)*, where the pleadings were ſame as * here. And after plea, the plaintiff had judgment; h was after affirmed upon writ of error; and without doubt, had not been aided by the plea, yet it would have been well by ſtatute of 16. & 17. *Car.* 2. Vide 1. Vent. 222. it is but form. * [444]

nd the plaintiff had judgment.

(a) Hob. 38. S. C. 1. Brownl. 9. (b) Stiles, 106.

Caſe 770.

Collins *againſt* Benning.

The ſtatute of Limitations cannot be pleaded to *indebitatus aſſumpſit* to pay on demand.

S. C. 3. Salk. 227.

IN an *indebitatus aſſumpſit*, the plaintiff declared on a promiſe to pay on demand; and *non aſſumpſit infra ſex annos* pleaded:

To which the plaintiff demurred; becauſe declaring on a promiſe on demand, he thought nothing was due till demand; and he ſhould have pleaded *non aſſumpſit infra ſex annos* after demand, or that no demand was within ſix years.

PER CURIAM. If the promiſe were for a collateral thing, which would create no debt till demand, it might be ſo (*a*); but here it is an *indebitatus aſſumpſit*, which ſhews a debt at the time of the promiſe, therefore the plea is good.

Jud. niſi for the defendant.

(*a*) Bull. N. P. 151.

Caſe 771.

Sarah Griffith's Caſe (*a*).

Whether fines and recoveries, by *feme coverts* under age, may be vacated. Notice thereof to be given to a purchaſor.

12 Co. 124. Dyer, 220. 3. Lev. 36. Skin. 23.

SEVERAL precedents were produced of fines, recoveries, and declarations of uſes thereupon being vacated on motions, becauſe of their being by *femes covert* under age. And one of the rules produced was, that the *feme* ſhould not be admitted to levy any more fines till ſhe came of age. And another, that the Counſel, who had adviſed it, ſhould be fined fourteen pounds, becauſe no writ of error could lie. And another, the huſband be fined one hundred pounds. And in the caſe of *Sir Robert Marſham*, a ſix clerk, procured his wife under age to levy a fine; and being ſent for into court, he was fain to deliver the fine and deed of uſes to be cancelled in court.

* [445]

Feme covert outlawed, diſcharged on motion.

2. Vent. 69. 2. Brownl. 279.

And *per* POWELL, *Juſtice*, If the commiſſioners, before whom the fine was taken, knew the *feme* to be under age, they are fineable: But there are no precedents of *vacats* of this kind antienter than the fourth year of *James the Firſt*. But the true antient way was to bring a writ of error; but becauſe the huſband would not join in a writ of error, &c. this way was introduced: And ſome Books ſay, that if a *feme covert* be outlawed without her huſband, there is no remedy for * her; but now in ſuch caſe the Court will diſcharge her upon motion. But in this caſe there appears that there is a purchaſor, and therefore we ought to be well adviſed. But in regard the *feme* is to be of age in two or three days time, let us *de bene eſſe* examine her age by affidavits and inſpection: and that was done, and the inſpection entered on record; and the rule was to ſee precedents, and give notice to the purchaſor.

(*a*) This caſe was in the Court of Common Pleas.

Anonymous

Anonymous.

Caſe 772.

Ejectment.

COURT will not make a rule for naming a good leſſor tment, unleſs there were a nonſuit, or verdict againſt , in a former trial (*a*).

694. 932. 1. Wilſ. 130. 3. Burr. 1801. 4. Burr. 1 Rep. 491. and Mr. Ser- jeant Runnington's Treatiſe on Ejectment, 188. 190.

Anonymous.

Caſe 773.

Prohibition to a pretended court. Ante, 438.

COURT may grant a prohibition to a court pretended; o where it is doubtful whether it will lie or not.

Anonymous.

Caſe 774.

COURT ſometimes will make a rule on the old ſheriff nt with his ſucceſſor.

The King *againſt* Luellin.

Caſe 775.

Indictment againſt an innkeeper for not receiving a ſick perſon, muſt ſtate he was a traveller.

DEFENDANT was maſter of the *Bell Inn*, in *Briſtol*. He dicted for not receiving one taken ill with the ſmall- was quaſhed, for not ſaying he was a traveller.

EASTER TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Thomas Trevor, *Knt. Attorney General.*
John Hawles, *Eſq. Solicitor General.*

Caſe 776.

* Anonymous.

Indictment at common law determines his election to proſecute ſo it on a ſtatute. Poſt. 502.

IT was moved to quaſh an indictment, which was for entering into a warren, and hunting and killing rabbits at night.

The exception was, that by the ſtatute of 3. *Jac.* 1. *c.* 13. the offender forfeits treble damages and coſts, half a year's imprisonment, and to find ſecurity for his good behaviour for ſeven years: and the indictment not concluding *contra formam ſtat.* the punishment of the ſtatute cannot be inflicted; and if the defendant be fined upon this indictment, he may be notwithſtanding again puniſhed according to the ſtatute, and ſo *bis pro eodem delicto.*

Vide 1. Inſt. 145. *a.* 146. *a.*

Sed non allocatur; for if one has two remedies, the one by act of parliament, and the other by common law, and takes one of them, he thereby determines his election.

Caſe 777.

Anonymous *(a)*.

Joint traders are jointly charged, unleſs ſpecial agreement.

FIRST, If there be ſeveral joint partners, and one has dealing generally with one of them in matters concerning their joint trade, whereby debt is due to him, it ſhall charge them jointly

(a) At *niſi prius* before Holt, *Chief Juſtice.*

and

ſ ſurvivors of them; but if in that caſe one had rather deal ne of them upon his own account, he muſt make his ient ſpecially, in which caſe the debt ſhall be only his and ecutors, and ſhall not ſurvive (*a*). ANONYMOUS.

ONDLY, If one or more of the joint traders become pt, his or their proportions only are aſſignable by the com- iers, to be held in common with the reſt who were not, pts (*b*). Bankrupt.

IRDLY, If there be an act of bankruptcy committed, creditor obtains a judgment ſubſequent to it, then a ſſion is taken out; now the judgment is thereby d. Commiſſion of bankruptcy avoids a judgment afterbankruptcy committed.

OURTHLY, If there be ſeveral joint traders, payment to one n is payment to all. So if they all, except him to whom ayment was made, were bankrupts, the payment is only idable as to his proportion; and if there be four partners, of three are bankrupts, and their ſhares aſſigned, and a pay- s made to him that was no bankrupt, it is a payment to all ignees, for now they are all partners. * [447] Payment to one partner is a payment to all.

See Watſon on Partnerſhip, 335. Chan. Caſes, 139. Heydon *v.* Heydon, See Jacky *v.* Butler, 2. Ld. Ray. 1. Salk. 392. Richardſon *v.* Goodwin, Blackhurſt *v.* Clinkard, 1. Show. 2. Vern. 203. Fox *v.* Hanbury, Cowp. Lord Craven *v.* Widdows, 2. 448. and Cooke's B. L. 3d edit. 597.

Anonymous. Caſe 778.

LL OF EXCHANGE was directed to *A.* or, in his ab- nce, to *B.* and begun thus: "Gentlemen, pray pay." ill was tendered to *A.* who promiſed to pay it as ſoon as he ſell ſuch goods; and in an action againſt him for ayment, the declaration was of a bill directed to him with- ny notice of *B.* Bill of exchange.

LT, *Chief Juſtice*, held it well.

ONDLY, That the acceptance was a conditional accep- (*a*). Conditional acceptance.

here the action being by an executor, and upon a debt laid due to the teſtator, he held it neceſſary to prove that the ance was in the teſtator's time. Acceptance muſt be in the teſtator's life-time.

See Smith *v.* Abbott, 2. Stra. Julian *v.* Shobroke, 2. Wilſ. 9. Sproat anbury *v.* Liſſett, 2. Stra. 1211. *v.* Mathews, 1. Term Rep. 182.

Anonymous. Caſe 779.

LT, *Chief Juſtice*. Every maſter of a ſhip may detain oods till he be paid for them; that is, for their freight (*a*). Maſter has a lien on the cargo for the freight.

(*a*) See Rex *v.* Sims, poſt. 511.

Turton

Caſe 780.

Turton *againſt* Reiner.

Declaration in prohibition.

IF a declaration in prohibition be by him who ſued the bition, and no plea be put in in due time, the plaint have judgment by *nihil dicit*, *ideo ſtet prohibitio*; but if the other ſide, and no plea, there ſhall be likewiſe a *nihil d* a conſultation.

Caſe 781.

Pickering's Caſe.

Aſſignment of bail taken by ſheriff, may be refuſed.

PER CURIAM. Let the bail taken by the ſheriff be good, yet the plaintiff may refuſe an aſſignment of proceed againſt the ſheriff by amercements; therefore it b him to take good bail. It is true, the ſheriff ſhall not be b in contempt for not bringing in the body; but the on is to amerce him, and ſheriff may proceed on the bail And the plaintiff, by 23. *Hen.* 6. *c.* 10. has election of *amercement (a)*.

(*a*) But ſee 4. & 5. Ann. c. 16. ſ 20. Salk. 99. Rex v. Dawes, 1. L Lord Brook v. Stone, 1. Wilſ. 223. 1. 722. Sellon's Practice, 1. vol. 1

* [448]

Caſe 782.

* The King *againſt* Foſter.

Appearance to indictment is only to the end of *the Term*; to civil act to the end of *the ſuit*.

FOSTER was indicted for a battery; after appearance with the proſecutor, who promiſed to ceaſe all proceedi the indictment; but notwithſtanding, the defendant not a ing the next Term was ſued to an outlawry.

HOLT, *Chief Juſtice*. The only ſure way had been, agreement with the proſecutor, to have ſubmitted to which in that caſe would have been moderate, or to get *proſ.* entered. And an appearance to an indictment differ appearance in a civil action; where once an appearance, i appearance to the end of the ſuit; but an appearance to dictment is of courſe but of that Term, and then if it be n ſecuted, then the defendant is out of court the next Ter may be outlawed; and the outlawry is a conviction w ſtands unreverſed: And your only way now is to ſubm a fine upon the outlawry. You might have got an att to appear for you upon the new act of parliament.

Caſe 783.

Lord Angleſea's Caſe.

Appearance for keeping the peace, not diſcharged till the end of the Term, unleſs Attorney General deſires it.

LORD ANGLESEA ſtood upon his recognizance for his ing the peace towards his lady (*a*).

(*a*) See Marquis of Carmarthen's Caſe, Foſter, 359. Lord Vane's Caſe, Stra. 1202. Earl Stamford's Caſe. B.R.H. 74. Earl Ferrers' Caſe, Burr. 631. 703. Lord Howard's Caſe, 11. Mod. Lady Strathmore's Caſe, 1. Term 696.

AS MOVED to have his attendance diſcharged in regard of ite of health, he ſpitting blood, and adviſed to go beyond is health. LORD ANGLE-SEA's *Caſe*.

CURIAM. By the courſe of the Court one is never diſ- ſo till the laſt day of Term, without the ATTORNEY AL comes and deſires it, though it may abſolutely be attendance being *de die in diem*. 2. Hawk. P. C. ch. 60. ſ. 17, 18.

he Court ordered them to produce affidavits of the truth was offered, and to move it again.

Willmott *againſt* Tiler. Caſe 784.

G arraigned on the appeal before, and having had time lead, he was committed, as before is ſaid (*a*); and being in at another day, he put in his ſpecial plea, and was re- : and at another day it was made a *concilium* in his ab- hich might well be, becauſe it was only to aſſign a day nſel to argue the point. The ſpecial plea of *autrefois acquit*, pleaded to an appeal of murder, may be made a *concilium* in the abſence of the appellee. S.C. ante, 416. S.C. Ld. Ray, 671. S.C. Salk. 63.

d now it appeared on *oyer* of the writ, that there were not ays between *the teſte* and *the return* thereof; ſo the plea *nteſtando* that the appellee ought not to anſwer the writ t of ſufficient number of days between its *teſte* and re- *o placito dicit*, and ſets forth the indictment before the JURY, &c. and *a capias* thereupon at large directed to f *London*, by virtue whereof he was taken, &c.; that at the ivery of *Newgate* at THE OLD BAILEY Juſtice-Hall in the ; &c. *London*, *coram* ſuch and ſuch *aſſ. et ſociis ſuis*, Juſtices delivery of *Newgate*, the indictment was delivered in; t he the appellee was by the ſheriff of *London* brought urt, and ſets forth his arraignment, and plea of not *per patriam*; that a jury was then and there impa- *viz. A. B.* &c.; that the jury found him guilty of *ghter*; that he was immediately aſked what he had to y judgment ſhould not paſs; that he prayed his clergy, was allowed him; that he then and there read as a nd was *burnt in the hand*, and confined eleven months Court; and avers identity of perſons, wound, &c. and ſo es that he ought not to be put to anſwer again.

* [449]

A writ of appeal with leſs than fifteen days between *the teſte* and *the return*, is cured by the appearance of the defendant, and his pleading to it *in chief*, for it is a defect that can only be takenadvantage of *in abatement*. 1. Salk. 59.

his there was a demurrer, and a joinder in it.

T OBJECTION. That it appeared that the Judges, be- om the trial was, were Judges of Gaol-Delivery of *New-* and it does not appear the defendant was in the gaol *gate*.

(*a*) Ante, 416.

ANSWER.

A plea in bar of an appeal, ſtatling the trial before Juſtices of *gaol delivery*, is good, although it do not ſhew the appellee was in THE GAOL. Ante, p. 114.

ANSWER. That objection would deſtroy all proceedings at the gaol-delivery. The indictment is found before juſtices of the peace, and by them ſent to the Juſtices of gaol-delivery; and the commiſſion runs for Juſtices of gaol-delivery for *London*, and another for *Middleſex*. And the current of precedents is, that the party came in in cuſtody of the ſheriff, *cujus cuſtodiæ ex cauſâ præd. commiſſ. fuit*; and ſince he ſays he was in cuſtody of the ſheriff of *London*, and ſince *Newgate* is the county gaol both of *London* and *Middleſex*, WE ſhall intend him in the ſheriff's cuſtody in *Newgate*, as by law he ought to be:—and WE muſt intend *Newgate* to be the county gaol, for that it does not appear to be a franchiſe; and that objection has been frequently over-ruled.

The words "Farringdon "*without*" do not import that the ward is *out* of the county of the city of *London*.

SECOND OBJECTION. The *Old Bailey*, where the Court is ſaid to have been kept, is ſaid to be "*in parochiâ, &c. in wardâ Farringdon extra London.*" which is nonſenſe.

* ANSWER. The ward of *Farringdon extra* is the name of the ward, and "*extra*" does not denote it to be out of the county of *London*, but is for oppoſition to *Farringdon* within the City walls.

* [450]

Juſtices of gaol delivery may try at the *Old Bailey*.

THIRD OBJECTION. Juſtices of gaol-delivery cannot try any indictment but what is found before themſelves.

ANSWER. It was ſo at common law, but altered by the ſtatute.

Verdict not guilty of the *felony* and murder, but guilty of *manſlaughter* is good.

THE FOURTH OBJECTION. The verdict as pleaded is contradictory, for they ſay he was acquitted of the *felony* and *murder*, and afterwards that he was found guilty of *manſlaughter*, which is felony.

ANSWER. That might have been ſaid better; but it muſt be underſtood, that they found him *not guilty* of the felony and murder *prout*, but *guilty* of felony and manſlaughter.

Error in a writ of appeal not cured by pleading to it. 1. Salk. 59.

THEN IT WAS INSISTED ON, that though the writ were naught, for the want of the due number of days between the *teſte* and return, yet now the defendant not having pleaded it in abatement, but taken it by a *proteſtando*, he had waived the advantage of it.

BUT TO THAT *it was anſwered* of the other ſide, that ſince it appeared to the Court by the *oyer* on record to be vicious, they muſt, *ex officio*, take notice of it.

An appellee, after pleading in chief to a bad writ, cannot take advantage of its defect in abatement.

THEN IT WAS INSISTED ON, that by pleading IN CHIEF he had admitted the writ good; for if he had pleaded *in abatement*, he ſhould not plead in chief till the matter in abatement were determined; for by pleading in chief at the ſame time, he would

d have waived the abatement; and for this 7. *Edw.* 4. WILLMOTT *againſt* TILER.
s was ſtrongly inſiſted on.

t note, That book only ſays, that where he pleads ſuch 1. Salk. 59, 60.
r in abatement, which denies the appellant's right of appeal,
at he is a baſtard, or that another is heir, he ought not to
in chief, becauſe ſuch a plea would admit him capable of
contrary to the plea in abatement; but in that very caſe,
he Serjeants at bar, he may plead over *in favorem*

nd ſo THE COURT held here, was the conſtant courſe for
dition; and the book of 7. *Edw.* 4. 15. agrees he ought to
over, where he does not deny the appellant's title to the
n, which is not done here.

was then objected, that this trial was now above a year An appelleemay conclude a plea at bar to AN APPEAL, with a *prout patet per recordum* in ſuch a court, although *a year* has expired ſince the trial of the INDICTMENT.
and they conclude "*prout patet per record.* in THE OLD
RY," whereas by an act of parliament all the records of
delivery are to be removed into the exchequer, into the
ly of the * treaſurer; and though a record be not local in it-
ret if they plead it in a certain place, we may traverſe it.

LT, *Chief Juſtice*. Suppoſe they do not remove the re- * [451]
ſhall that turn to the prejudice of another? And that act
hich you ſpeak is grown obſolete, for indeed they do for the
part remove them into this Court; and if you pleaded *nul*
cord, a *certiorari* would go to the Judges of gaol delivery;
they did not certify a record, then it were for your advan-
And he remembered a caſe of appeal, where the appellee
d a falſe addition in abatement, *viz.* that he was an inha-
of *A. abſque hoc*, that he was an inhabitant of *B.* as it
aid; and he was ordered to anſwer over to the charge; and
h he might have pleaded a conviction of manſlaughter, and
ance of clergy, yet to lie open to the appeal he pleaded not
; and it came to trial on both iſſues; and as to the iſſue of
uilty, he was found guilty of manſlaughter; and the other
ſpecially, that the appellee was accidentally at *B.* and not
wiſe an inhabitant there; and ſo the queſtion was, Whether
uld be ſaid to be an inhabitant at *B.*? but that point never re-
d any determination: but the conſtant practice is to lay him
habitant where the fact is committed: and *in favour of life*
y plead a ſpecial matter in bar, and not guilty too; but for
ition's ſake, if he plead in abatement, the Court will make
lead in bar beſides; and the being of *oyer* of the writ, makes
of the record.

PER TOTAM CURIAM, The conviction of manſlaughter A conviction on an indictment is good bar to an appeal.
ergy is a good bar of the appeal, without diſpute (*a*).

(*a*) 1. Salk. 63.

But

If a writ of appeal be bad, and the appellee pray oyer and then plead in bar of the appeal, final judgment ſhall be given for the defendant on the *plea in bar*, and not againſt the appellant on *the writ*.

But PER CURIAM, The only doubt is, whether we judgment on *the writ*, or on *the plea in bar*; for if we the bar, and the writ be inſufficient, our judgment will thing, according to *Vaux's Caſe* (*a*); for it will be no ma acquittal upon a bad writ, and then they may arr again; and though *Vaux's Caſe* be after verdict, and th demurrer, that makes no difference.

But HOLT, *Chief Juſtice*, If *Vaux's Caſe* were *res i* would deſerve conſideration.

And at another day, PER CUR.

HOLT, *Chief Juſtice*, delivering their opinion: AGREE that judgment final ought to be given: for thou ly the writ is bad for want of fifteen days between and *the return*, ſo as if *non eſt inventus* had been and the defendant ſued to an outlawry, it had been en yet ſince he appeared to it, and pleaded in chief, he has advantage; for the reaſon why there ought to be fifteen
* [452] tween the *teſte* and return * appears upon conſideration o tute of *Articuli ſuper Chartas*, c. 5. 2. *Inſt.* 567. by wh tute it is neceſſary there ſhould be fifteen days between and the return of writs; and thus it was antiently, for th puted one might travel twenty miles a-day, and theref held fifteen days journey ſufficient to come from any part *land*, and for this a day's journey was called *Dieta* (*b*) the reaſon was, that party might have ſufficient time to and prepare an anſwer; and if the proceſs was too ſtreigh erroneous; but if the defendant, by appearing and plea chief, diſpenſe with this favour, he may, and thereby m writ good. 9. *Edw.* 4. 18. 12. *Edw.* 4. 11. A *ſcire fac*

Vide 1. Vent. 7.

A FINE wanted the due number of days between the return, and that writ did partake of the nature of a real yet if the party appeared and pleaded to it, it made it g a writ of covenant to levy a fine want fifteen days betw *teſte* and return, yet if party appear, and fine be levie good. This indeed has been afterwards queſtioned by ſome but was adjudged to be a ſtated doctrine, and needs no r tlement; for if the defendant appear and anſwer, taking advantage of this fault of the writ, as if it were in and be not attached fifteen days before, the fault of the thereby cured.

Et ſic PER CUR. *Jud. pro defendente* upon the plea in b

On judgment in favour of an appellant on a bad writ, he may be committed to the marſhalſea. Salk. 61. Stra. 858.

Notwithſtanding, the appellant's Counſel moved *inſtan* leave to charge the defendant in cuſtody of THE MAR the judgment being in bar upon a bad writ, according to *Caſe*.

(*a*) 4. Co. 39. (*b*) Britt. 135 138.

hich THE COURT was very angry, for it was to arraign dgment to their face, but ſaid they could not help it; motion was granted; but *materia dormivit.* WILMOTT *againſt* TILER.

', *Chief Juſtice*, occaſionally in this caſe ſaid,

r, That a clerk in orders, upon his having his clergy, be burnt in the hand. Clerk not to be burnt in the hand.

lawk. ch. 33. ; the ſtatutes 10. & 11. *Will.* 3. c. 23. ; 5. *Anne*, c. 6. ; 19. *Geo.* 3. c. 74.

NDLY, That none could have the benefit of his clergy cept a clerk. A *clerk* may have clergy twice.

4. Hawk. P. C. ch. 33. page 25. 4. Black. Com. 360.

DLY, That in all caſes before 18. *Eliz.* c. 7. where a l clergy, he was delivered to THE ORDINARY, but in no e. Clerk delivered to the ordinary. See Hale's Sum.

. Kely Rep. 25. 2. Hale, 382. Staund. P. C. 137. Dyer, 214. 4. Hawk. P. C. h. 33. ſ. 117, 118, &c.

THLY, That where one in orders has his clergy, there be a ſpecial entry made why he was not burnt in the nd if he be clerk in orders or not, is triable by his ordi- Entry where a *clerk* is allowed clergy.

HLY, That if a clerk ſhew his ordination, he need not e book, becauſe it is preſumed a clerk in orders can Clerk ſhall be preſumed literate.

2. Hale P. C. 372. 4. Black. Rep. 360.

HLY, That in the time of *Edw.* 3. clergy was denied to having *habitum et tonſuram.* *Habitum et tonſuram.*

2. Hale P. C. 372. 4. Black. Rep. 360. 4. Hawk. P. C. ch. 33. ſ. 5.

ENTHLY, That by 1. *Edw.* 6. *c.* 12. § 14. Peers to have of clergy without burning in the hand (*a*), though they ead. Peers to have clergy.

* [453]

the Ducheſs of Kingſton's Caſe. 11 State Trials, 262. 4. Hawk. P. C. ge 250.

Anonymous. Caſe 785.

EVIN by plaint in an inferior court was removed hi- r by *certiorari* ; and upon the removal the plaintiff his declaration. On removal of replevin into B. R. by *certiorari*, the declaration cannot be changed.

CURIAM. That cannot be, for whatever is below ought ow here. And if one remove a replevin by *recordare* and declare for leſs than he took, the defendant muſt r them, and alſo for what he has not declared on ; and if eturn, he ſhall have it for all. And if one replevy part oods taken, the other ſhall avow for them and the reſt d have return, if his avowry go for him, for all. a *certiorari* removes the pledges below, ſo as *ſcire facias* againſt them. And the entry here above, in this caſe of of replevin by plaint, ought not to be of a *ſummonitus* upon an original, but as of a cauſe removed. 3. Mod. 58. Ante, p. 430.

Caſe 786.

The King *againſt* Ford.

On a ſummary conviction, the Court will intend that the defendant was ſummoned. 1 Stra. 261. 608.

FORD was convicted in a ſummary way on the ſtatute of deer ſtealing (*a*). To which it was objected,

FIRST, That it did not apppear on the record, that the defendant had any notice to come and make his defence; and *citatio eſt de jure naturali*, that none be convicted without an opportunity of making defence.

Quod CURIA *conceſſit*. But this being by perſons by law intruſted with the adminiſtration of juſtice, we will intend they have proceeded regularly and legally, if the contrary appear not (*b*).

Negative part of a penal ſtatute need not be averred. 1. Stra. 66. 2. Stra. 711, 712. 1101.

SECONDLY, It is not ſhewed to be the offence deſcribed by the ſtatute; for it is not ſaid that deer were uſually kept there for ten years before (*c*).

PER CURIAM. If that be notoriouſly known, it need not to be averred.

A conviction of killing deer, ſtating it was without the owner's conſent on ſuch a day, is good.

THIRDLY, It is ſaid we killed the deer, without conſent of the owner, on ſuch a day; ſo they tie up the want of conſent to the day, and that is ill, for the conſent might have been given the day before to kill the deer the next day, and then it would be a lawful killing, though in ſtrictneſs without the owner's conſent on that day.

But PER CURIAM, A conſent to-day to kill a deer any day for a month, is a conſent for every day until it be executed or revoked, which cannot be * till notice.

* [454]

Conviction affirmed, though the witneſs was indicted for perjury.

LASTLY, It was moved to ſtay the affirming the conviction, becauſe there was an information for perjury againſt the witneſs on whoſe oath it was, until that were tried.

Sed nihilominus it was confirmed.

(*a*) The ſtatute 3. & 4. *Will. & Mary.* c. 16. But this ſtatute is repealed, and other proviſions enacted by 16. *Geo.* 3 c. 30.—See 1. Hawk. P. C. ch. 46.

(*b*) Rex *v.* Simpſon, 1. Stra. 44. Rex *v.* Theed, 1. Stra. 608. S. C. Lord Raym. 1375. S. C. 8. Mod. 319. Rex *v.* Johnſton, 2. Stra. 261. Rex *v.* Aiken, 3. Burr. 1785.

(*c*) See Rex *v.* Calcutt and Mash, 2 Stra. 1119.

Caſe 787.

Kilderton *againſt* Wilkenſon.

Attachment ſhall go againſt *under-ſheriff* for not returning a writ.

AN under-ſheriff returned a *fieri feci*, and a *venditioni exponas* was ſued out. After two or three rules upon the ſheriff to make a return, and failure therein, an attachment was granted againſt him;

THE COURT declaring they never would grant it againſt the *high-ſheriff* for not returning the writ. And ſuch a rule the ſame Term in the like caſe againſt the under-ſheriff of *York*.

Peacock

Pocock *againſt* Thornicroft.

Caſe 788.

AVE was granted to file an information againſt the defen- ant for inveigling away the plaintiff's wife, and procuring ants and tradeſmen to ſell her goods, in order to ſaddle the id with the debt, agreeing with the ſeller to deliver him the again.

An information lies for inveigling a man's wife, and giving her credit with a view to charge the huſband.

Anonymous.

Caſe 789.

IFE ſhall be admitted to ſwear the peace againſt her uſband, becauſe a matter concerning her perſon (*a*).

A *wife* may ſwear the peace againſt her *huſband*.

ee Lord Angleſea's Caſe, ante; ims' Caſe, 2. Stra. 1207. Mar- rmarthen's Caſe, Foſter, 359. Lord Vane's Caſe, Stra. 1202. Lady Strathmore's Caſe, 1. Term Rep. 696. *notis*.

Anonymous.

Caſe 790.

. CURIAM. When a cauſe is removed from *London*, e very record is never removed; becauſe they expect a *rndo*.

The real record never removed from *London*.

Anonymous.

Caſe 791.

R CURIAM. One has four days to move in arreſt of dgment after the coming in of THE POSTEA; but defendant peril muſt watch its coming in.

Four days to move in arreſt of judgment.

1. Sellon's Practice, 521. Taylor v. Whitehead, Dougl. 745.

Maſon *againſt* Atherbury.

Caſe 792.

gave a bond for his true impriſonment, and after eſcaped, nd THE MARSHAL aſſigned the bond to the plaintiff, who t to judgment; the obligee brings in the original defendant, e marſhal accepts him.

Forfeiture of bond.

d PER CURIAM, He by the acceptance has diſpenſed with rfeiture of the bond.

* Anonymous.

Caſe 793.

t CURIAM. If juſtices of one county make an order r the removal of a poor perſon into another county, the belongs to the juſtices of the county where the order ade. And if orders be removed hither, and before it be ed the juſtices make a new order, it is a contempt; and der is not quaſhed till a rule be abſolute.

Appeal againſt an order of removal muſt be to the ſeſſions of the county in which the order was made.

See 2d vol. of Mr. Conſt's edit. of Bott's Poor Laws, ch. 13. page 819. to 869.

Caſe 794.

Thorp *againſt* Thorp.

If *A.* (having mortgaged certain lands to *B.* agree to make a releaſe of his equity of redemption, *in conſideration of which B.* agrees to pay *A.* the ſum of ſeven pounds, the making of the releaſe is a *condition precedent* to the payment of the money.

S.C. Comy. 98. S.C. 1. Ld. Ray. 235. 662. S.C. Holt, 28. 96. S. C. 1. Lut. 245. S.C. N. Lut. 75. S.C. 1. Salk. 171. 1. Roll. Abr. 414. 1. Vent. 177. 214. 4. Bac. Abr. 290. Caſes T. T. 164. Dougl. 683. 1. Stra. 458. 534. 569. 571. 2. Burr. 900 1. Term. Rep. 645. 4. Term. Rep. 761.

* [456]

ERROR from the court of common pleas of a judgment in an action on the caſe, wherein the plaintiff declared, that the defendant had and held of him, by way of mortgage, two cloſes of copyhold lands; and that there was a diſcourſe between them concerning the plaintiff's releaſing his equity of redemption therein to the defendant, and concerning divers ſums of money due from the plaintiff to the defendant upon the ſaid mortgage; upon which the plaintiff did agree with the defendant that he would releaſe to him the ſaid equity of redemption, *in conſideration of which* the defendant did agree with the plaintiff to pay him ſeven pounds above all that was due; and that, in conſideration that the plaintiff promiſed the defendant to perform all of his ſide, the defendant promiſed the plaintiff to perform of his ſide; and avers that he did perform all on his, the plaintiff's ſide, but that the defendant paid one pound ſeven ſhillings of the ſaid ſeven pounds, and no more, &c.

To this the defendant pleads in bar, that long after the promiſe, *viz.* 29 *July* 1694, the plaintiff did, by indenture made between him and the defendant, releaſe to the defendant "all "manner of actions, ſuits, debts, duties, ſum and ſums of "money, and all demands whatſoever, which ever he had, or "he, his heirs, executors or aſſigns ever ſhould have, for or by "reaſon of any thing, matter or demand whatſoever."

Upon *oyer* of this deed of releaſe, it recited the ſaid mortgage, and releaſed "all proviſoes therein, and all his eſtate, right, title "and intereſt in the ſaid cloſe, both in law and equity;" and then follows the foregoing clauſe (*a*).

And upon this the plaintiff demurred, and judgment for the plaintiff in the court of common pleas.

COWPER *for the plaintiff in error* objected to the declaration, That the conſideration ſet forth in it was not ſufficient to ſupport a promiſe (*b*); for though equity of redemption be a* thing pretty well known, and for the moſt part valuable, yet ſome may be not of any value, and this may be of them; and therefore it was neceſſary to ſhew that it was of ſome value; and for an example of an equity of redemption without value, he put this caſe: If a mortgage be till ſo much money be raiſed by the mortgagee out of the profits; here the mortgagor has an equity of redeeming by payment of the money and charges, and yet it is of no value to the other to have it releaſed; but to the contrary, the redemption there would be rather a benefit to him.

(*a*) See the pleadings in the caſe, Lutw. 245. 3. Lord Ray. 341.

(*b*) See 2. Black. Rep. 820. Cowp. 294. 1 Com. Dig. "Action of Aſſumpſit" (B).

SECONDLY,

NDLY, He objected, that it did not appear by the count mortgage was forfeited, and then the plaintiff had no of redemption. *Ergo* no conſideration for the promiſe, c. *Vide* 2. *Saund.* 136. *Style* 248.

the plea in bar is good, for the releaſe is full in words, equent to the promiſe. But ſay they, the money was to in conſideration of the releaſe; therefore the releaſe, reated the duty, cannot *in eodem inſtanti* extinguiſh it. I anſwer, that the payment of the money does not ariſe releaſe, but from the promiſe; and the promiſe, and not iſe, being the conſideration of the debt, action lies upon ual promiſes before the releaſe. *Ergo* the releaſe comes cauſe of action, and conſequently deſtroys it. *March* 75. promiſes are their own mutual conſiderations, there needs rmance to ſupport the action. *Hob.* 88. In conſideration plaintiff promiſed to deliver the defendant a cow, the it promiſed the plaintiff fifty ſhillings; in an action for the here needs no averment of delivery of the cow or *vice Cr. El.* 343. A declaration, that in conſideration *A.* ebted to *B.* by bills, and that he promiſed to deliver him ills, he promiſed to give him good ſecurity by bond for ey, and avers the delivery of the bills; the defendant tra- he delivery, and on demurrer adjudged againſt him, be- t material; and it was not the conſideration of the *af-* but the promiſe to deliver was it. *Cro. El.* 704. *ſimile* (*a*).

Cro. El. 889. the promiſe is, *ſuper ſolutionem* of ſuch a do, &c. therefore the thing not demandable before pay- So is *Cro. Car.* 19. So that if here the cauſe of action e upon the promiſe before any releaſe made, the releaſe ent clearly diſcharges it; *ſecus* not if there were no more aſe. * And if the releaſe be what gives them cauſe of then they ſhould ſhew a releaſe made, or a tender of it; generally, as here, that they have performed all of their

* [457]

it is objected, That although an action had accrued to the immediately upon the promiſe, yet this releaſe ſhould not e it; for that the releaſe ſhall be taken according to the f the parties, which was only to diſcharge the equity of re- n; and the general words of it ſhall be reſtrained and qua- the foregoing ſpecial words. But I anſwer, that after g the equity of redemption by expreſs words, there are in ſame clauſe general words of "all actions and demands;" agree are qualified by the ſpecial words and intent of the And then comes the clauſe in queſtion, diſtinctly and

Vide 1. And. 64. 3. Cro. 182. Hetley, 15. 9. *Edw.* 3. 43. 2. Roll. Abr. 393. Hob. 74. Dy. 240. 2. Roll. Abr. 396. Hob. 275.

(a) Pordage *v.* Cole, 1. Saund. 319. Stapleton, Stra. 617. Dawſon Stra. 712. Bcon *v.* Eyre, 2. ep. 1312. Jones *v.* Barkley, Dougl. 684. Kingſton *v.* Preſton, Dougl. 689. Goodiſon *v.* Nunn, 4. Term. Rep. 763. Duke of St Albans *v.* Shore, 1. H. Bl. Rep. 270.

any thing but the ten pounds? and upon this div
and 15. *Aubry's Caſe*, is diſtinguiſhable from the

CHESHIRE *contra*. As to the want of averrin
made a releaſe, they in their replication ſhew that
and ſet it forth; and that ſupplies that defect, if
times the fault of a declaration may be helped by
plea; as the want of a *venue* by pleading a releaſe.
Debt upon a bond, and it did appear by the bond
payment was not yet come; the defendant pleade
found againſt him, and plaintiff had judgment; fo
ing the releaſe he waived the other advantage; a
c. . there cited, Debt by an executor; the defe
that the teſtator had made two executors, and that
leaſed to him; and iſſue thereupon found for the pla
* [458] judgment, though the defendant might have * aba
becauſe he waived that advantage by his plea. 3. *Cr*
766. 1. *Vent.* 114. 126.

And this Court will take notice what an equity of
as well as a court of equity of truſts and mortgages.
1. *Vent.* 41. That the Court will take notice of an
ſideration; and we need not ſhew what our equity
was, or how created. For firſt, They requeſted we
ſuch a thing to them; and it cannot be imagined th
if we had none. Indeed, if it had appeared to the
equity was of no value, it would have been the ſtron
though even ſo, there being ſomething to be done by
be a trouble to us, it would have been a good conſ
promiſe. And if, in the caſe quoted out of *Saunder*
recited that he was bound by the bond, the Court
ſo, and give judgment againſt him. And in all the
been put of the other ſide, it did appear to the Court
nothing of value, or any pain or trouble to the plai

the words of releaſe are not ſufficient to diſcharge the pro- Thorp against Thorp.
ecauſe it was not in demand at the time of the releaſe; for
aſe was a condition precedent, whereupon the demand did
the plaintiff; and therefore the releaſe could not deſtroy Vide Cro. Eliz. 837.
which it gave birth. 19. Hen. 6. 62.

ſuppoſe an action did ariſe upon the mutual promiſes, yet
rty had a reaſonable time to perform; and perhaps each had
r his life, if not haſtened by requeſt; and neither is alledged
Indeed the promiſe, as ſoon as made, was releaſable by the
promiſe," but not by the words "actions or demand,"
till a convenient time after; which is not alledged to have
tween the promiſe and releaſe.

it is not abſolutely neceſſary the words inſiſted on in this
muſt be rejected as fruitleſs, without they are extended to
this demand; for it may be, the mortgagee might be
able to the mortgagor for ſome * of the profits of the lands, * [459]
night be releaſed by the words.

T, *Chief Juſtice.* A releaſe of an equity of redemption is Releaſe of an equity of redemption is a good conſideration of a promiſe.
conſideration for a promiſe; and we can take notice of an
of redemption, and that it is a valuable thing. But ſuppoſe
not a thing valuable, and the caſe were this: *A.* is poſſeſſed
Acre, to which *B.* has no manner of right, and *A.* deſires Cowp. 294.
leaſe him all his right to *Black Acre*, and promiſes him, in
ration thereof, to pay ſo much money, ſurely this is a good
ration and a good promiſe, for it puts *A.* to the trouble of Where the doing a thing will be a good conſideration, the promiſe of doing it will be ſo.
a releaſe. Then where the doing a thing will be a good
ration, a promiſe to do that thing will be ſo too; and though
it of an averment, that a releaſe was made, would have been
emurred to, yet it is now helped by going over and plead-
one covenant to do ſeveral things in a certain deed agreed
in the end bind himſelf in a penalty for ſo doing, and debt
ght for the penalty, and ſhews generally, that he has done
of what is agreed on, this would be bad on demurrer, but
ver cures it. So if one covenant, that if *J. S.* do ſuch and
ings that he will pay him ſo much money, *J. S.* brings
and ſays generally, that he performed all the things, this
be bad on demurrer, but cureable by pleading over.
this being a general diſtinct clauſe, ſeems to diverſify this
m all the caſes before put, where the general words,
ed by the precedent particular ones, are in the ſame clauſe
particulars.

nother day this Term, after great conſideration, THE WHOLE
came to one reſolution, which was thus delivered:

, *Chief Juſtice.* We all agree, that the promiſe was not Releaſe will bar an action where are mutual promiſes before performance.
ed by this releaſe. It was urged at the Bar by MR.
R, that if the plaintiff might have founded an action upon
ual promiſe and agreement before any performance on his

tiung which at the time of releaſe is not demandable.

therefore not demandable.

So THE WHOLE QUESTION will be here, Wheth could have an action before the releaſe? And as to urged, that in this caſe there were mutual promiſe promiſe is the conſideration of the other; and tha brings the action needs not aver any performance c this likewiſe would be a true and neceſſary conſequer miſes were true. But where the one promiſe is th of the other, and where *the performance*, and not *th* is to be gathered from the words and nature of the a depends entirely thereupon; for if in this caſe there promiſe that one ſhould releaſe his equity of reden the other ſide that the other would pay ſeven pounds might bring his action without any averment of perf this agreement is not ſo, but that the plaintiff ſhou equity of redemption, in conſideration whereof the to pay him ſeven pounds; ſo that the releaſe is the and therefore being executory is *a condition precedent* be averred. And whereas there ſeems to be a variance upon this learning, it will be fit on this occaſion to ſe agree the caſe in *Hob.* 58. to be good law; for there agreement that one ſhall deliver a cow to the other, other ſhall give him ſo much money, and therefore th for either ſide, without performance of his promiſe; agreement *A.* were to deliver *B.* a cow, and that for i deliver him a horſe, there the delivery of the cow wou *tion precedent*, and therefore ought to be performed b bring his action; and upon this diverſity the Books a ble. 15. *Hen.* 7. 10. *pl.* 17. If *A.* covenant with *B.* for a year, and *B.* covenant with *A.* to pay him ten p *A.* ſhall maintain an action for the ten pounds before but if *B.* had covenanted to pay ten pounds for the

Where the promiſe is executory, it is a condition precedent.

If one is to do a thing for which another thing is to be done, it is a condition precedent.

FIRST, If there be a day ſet for the payment of money, or doing the thing which one promiſes, agrees, or covenants to do, *for* another thing, and that day happens to incur before the time the thing for which the promiſe, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, "that the party ſhall pay the money," or "do the thing *for* "ſuch a thing," or "in conſideration of ſuch a thing," after the day is paſt the other ſhall have an action for the money or other thing, although the thing *for* which the promiſe, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that caſe left to mutual remedies, on which, by the expreſs words of the agreement, they have depended. *Vide* 48. *Edw.* 3. 2, 3. cited in *Ughtred's Caſe* (*a*), where the diverſity is taken when there are mutual remedies and not; it is thus put in that Book: *Sir Richard Pool* covenants with *Sir Ralph Tolcelſer* to ſerve him with three eſquires in the wars of *France*; *Sir Ralph Tolcelſer* covenants, *in conſideration* of thoſe ſervices, to pay him ſo much money; and there it is ſaid, action will lie for the money without any ſervices performed. But if you look into the Book at large, you will find it was upon the diverſity which I have taken; for the caſe in 48. *Edw.* 3. 2, 3. is, *Richard Pool* covenants with *Ralph Tolcelſer* to ſerve him with three eſquires in the wars of *France*, and *Ralph Tolcelſer* covenanted with him to pay him ſo much money for the ſervice; and it was further agreed, that twenty marks of the money ſhould be paid in *England*, at a day certain, before they went for *France*, and the reſt by quarterly payments, which might likewiſe incur before the ſervice; and upon action brought by *Sir Richard Pool* it was objected, that the ſervice was not performed; but there was no room for that objection upon the diverſity which I have taken, the money, by the agreement, being made payable at a day certain, before the ſervice was to have been performed. 1. *Vent.* 147. Covenant, that in caſe *A.* would let *B.* enjoy land for a certain term of years, for the enjoyment he would pay him ſo much money before the expiration of the years. 3. *Leo.* 56. Covenant to pay ſo much money, the other making him a good eſtate in ſuch lands: held the making the eſtate to be a condition precedent, and therefore to be averred. 1. *Saund.* 319. is upon the ſame diverſity: An agreement was to let * a houſe to the plaintiff, with certain brewing veſſels; the plaintiff covenants to pay ſo much money for it before *Midſummer-Day*; and here, becauſe a day certain was appointed for the payment, though no aſſurance was made of the houſe, &c. yet an action lay for the money. If *A.* covenant to make an aſſurance of lands to *B.* who covenants to pay him ten pounds in conſideration thereof, there he is not bound to pay the money before the aſſurance made; but if he had covenanted to pay the money in conſideration of the covenant

But if it be to be done at a time before which the other is to be done, it is not a condition precedent, but parties muſt have mutual remedies.

* [462]

(*a*) 7. Co. 10. b.

THORP *againſt* THORP.

nant to make the aſſurance, he would be liable to an actio diately (*a*).

Where it is a condition precedent, the doing it muſt be averred to maintain an action.

SECONDLY, If there be a day for the payment of the mon ing of other act *for* another, and that day is to be after the ance of the thing *for* which the promiſe, &c. was made, th agreement be to pay the money, or do other thing, "for" "conſideration," or ſuch other words that would make a precedent, there ſuch things, for the doing or performing the other agrees to pay the money, or do other thing, averred to maintain an action; and for this *Sir W. Je* The executor of *A.* brought an action on the caſe declaring, that in conſideration *A.* in his life-time did p aſſure certain lands to *B.* before *Michaelmas* next, *B.* pr pay him ſo much money for the land; ſo the aſſurance made before *Michaelmas*, and the money was to be paid fo and conſequently after *Michaelmas*, for *A.* had time till *M* to make the aſſurance; and becauſe the aſſurance was to made firſt, and the money by agreement to be paid for though there were mutual promiſes, yet it was adjudged would not lie for the money without making the aſſur This caſe, as it is there reported, is intricate, and requi deration to make this conſtruction upon it; but upon ex it is a full authority in point. *Dy.* 76. *pl.* 3. *A.* agrees *B.* a hawk at *Midſummer*, for which he agrees to pay h at *Michaelmas*; there if a hawk be not delivered at *M* there ſhall be no horſe delivered at *Michaelmas*, nor ar for it. *Ughtred's Caſe* has afforded a ground for a varie nions upon this queſtion; but ſuch as ſeem againſt theſe laid down by me ſhall receive a full anſwer. And in 1. 414. are ſeveral caſes which have been urged againſt me is ſaid to have been in *Michaelmas Term*, in the ſevent *James the Firſt*, and it was a charter partite between *A.* which *A.* covenants to go a voyage, and take in ſeveral

* [463] ſeveral * ports beyond the ſeas, and return with them h covenants to pay *A.* for all that voyage one hundred ſeven pounds at a day, whether after or before the voyag doubt by the Book; and there it was adjudged, there n an action lain for the money without averment of perfo the voyage: and this ſeems an authority in point againſt

(*a*) The reaſoning on this point of the caſe, together with the authorities 28. *Edw.* 3. 2, 3. 7. Co. 10. b. 1. Vent. 147. and 1. Saunders, 319. are recognized as law by Mr. Juſtice Buller, in the caſe of Terry *v.* Duntze, in the court of common pleas, Hilary Term, 35. *Geo.* 3. in which it was determined, that if *A.* covenant to build a houſe for *B.* and finiſh it on or before a certain day, in conſideration of a ſum of money which *B.* covenants to pay *A.* by as the building ſhall proceed, the houſe is not a condition the paying the money, b covenants are independent; *A.* may maintain an action o *B.* for the whole ſum, thoug be not finiſhed at the tim Terry and Another *v.* Du 2. H. Bl. Rep. 389. to 393.

firſt, it does not appear there but that the day of payment was before the voyage performed; but a full anſwer to it is, that there was a writ of error brought, and that judgment reverſed for want of an averment. *Vide* 3. *Bulſt.* 147. *Rolle* reports the judgment in the common pleas, in the ſeventh year of *James the Firſt*, but it ſeems had not ſeen the reverſal thereof, which was in the ninth year of *James the Firſt*, two years after, as it is in *Bulſtrode*, where it is adjudged, that "*pro totâ transfretatione*" is a condition precedent, and that its being in mutual covenants makes no alteration. Then there is 1. *Roll. Abr.* 415. ſaid to be in *Michaelmas Term*, in the fifteenth year of *Charles the Firſt*; and it ſeems alſo againſt me in point: There were articles of agreement made by *A.* in behalf of *B.* of the one part and *C.* of the other part, where it was covenanted by *A.* that *B.* for conſideration hereafter expreſſed, ſhould convey certain lands to *C.*; *C.* on his part, for the conſideration aforeſaid, covenanted to pay *B.* one hundred and ſixty-ſix pounds; and it was adjudged, that the aſſuring the land was not a condition precedent. But this caſe does not come up to ours; for there is an expreſs covenant, that (for conſideration hereafter expreſſed) *B.* would convey to *C.* and *C.* (upon conſideration aforeſaid) covenants to pay the money; and that muſt be for as much as *A.* hath covenanted that *B.* ſhould aſſure lands for conſideration hereafter mentioned, that is, that *B.* hath covenanted to pay ſo much money; for it is, "*pro conſideratione* "*prædictâ*;" and the queſtion is, What is meant by the words "*pro conſideratione præd.?*" It is not ſaid, "for conſideration of "conveyance of the land," but "*pro conſideratione præd.*" which muſt be underſtood in conſideration of the agreement that *B.* ſhould convey, &c.; for the one covenants for conſideration hereafter mentioned, which muſt be the covenant for payment of the money, and the other covenants for conſideration aforeſaid, which muſt be that *A.* covenanted that *B.* ſhould convey. But I muſt needs ſay there is another home caſe; it was alſo in the time of *King Charles the Firſt*, and it was on mutual promiſes to ſtand to an award between *A.* and *B.* and laid in conſideration *A.* on his part did promiſe to ſtand to the award, *B.* on his part did promiſe to ſtand to it; and the * award was made, that *A.* ſhould pay *B.* ten pounds, in conſideration whereof *B.* ſhould enter into an obligation to releaſe unto *A.* all actions; *A.* brings an action againſt *B.* for not entering into the obligation according to the award; and he did aver, that he had done all on his part, but that *B.* had not entered into the obligation; and the exception was taken, that there was no averment of the payment of the ten pounds, in conſideration whereof he was to have entered into the bond; but it was ſaid, there needed no averment; and this is full againſt me. But *Rolle* himſelf there ſays the Court were divided. And 1. *Cro.* 384. gives a quite contrary report of the caſe, and ſays, JONES and BERKELY held it a condition precedent, againſt CROKE; ſo I rather believe CROKE, who was one of the Judges, and tells you himſelf was of a contrary opinion. And as to *Haye's Caſe*, which

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Vide 1. Vent. 41.

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is

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is alſo in 1. *Roll. Abr. ubi ſupra*, it is reported 1. *Cro.* 433. and it has no ſuch point in it. Theſe authorities therefore are well anſwered. There are ſome other ſcattered authorities in the Books of this kind. But let us now ſee the reaſon of the thing. What is the reaſon that mutual promiſes ſhall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promiſe to have what he would have done to him, it is his own fault. If the agreement be, that *A.* ſhall have the horſe of *B.* and *A.* agree that *B.* ſhall have his money, they may make it ſo; and then there needs no averment of performance to maintain an action on either ſide; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his ſide, it muſt be then averred: as where a man agrees to give ſo much money for a horſe, it is plain he meant to have the horſe firſt, and therefore he ſays the money ſhall be given for the horſe. And it would be very dangerous to make every curſory agreement of parties to amount to mutual promiſes to bear an action without averment of performance: and therefore if two meet, and the one has a horſe to ſell, and the other would buy one, and they agree on the price, and then part without any earneſt, or reducing the matter ſolemnly into writing, there, though there be no words of condition precedent, ſuch curſory agreement ought not to be admitted as evidence of a mutual agreement; and it ought not to paſs for a contract, but rather for a bare communication. *Vide Dy.* 30. — 4. *Style*, 32. But if there be a ſolemn tranſaction, as writing,

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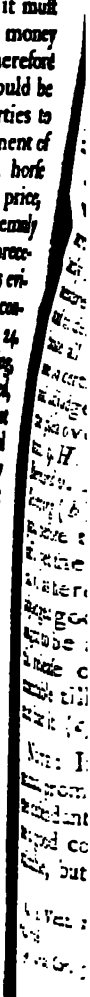
* as that *A.* would deliver his horſe to *B.* and no time appointed, and that *B.* ſhould pay ſo much money to *A.* there, if there be not the word "*for*" or other words of condition precedent, a mutual action will lie, without averment of performance; but if it be only a diſcourſe, without the ſolemnity of writing, earneſt, &c. it ought not to be allowed. There is a caſe in 2. *Mod.* 33. In *effect*, the plaintiff declared, that in conſideration that he promiſed to aſſign to the defendant his intereſt in certain land, the defendant promiſed to pay him *proinde* ſo much money, and averred that he offered to aſſign the intereſt; but that matter being not well pleaded, the queſtion was, whether it was neceſſary to aver performance; and held, on the reaſon of *Ughtred's caſe*, that it was not. And this will be a light to the reaſons of *North v. Wild* there. *Vide Style*, 186. Covenants were between *A.* and *B.* that *A.* ſhould bring 500 ſoldiers to ſuch a place, by a day certain, to be tranſported; and that *B.* ſhould attend there then with ſhips to tranſport them, and both parties failed; and the queſtion was, Whether, though *A.* had brought no ſoldiers, *B.* had broke his covenant, in not being ready with ſhips? and held, that *B.* had broke his covenant, though *A.* had not brought the ſoldiers. But this differs from our caſe; for there are two diſtinct acts to be done, one is to be ready with the ſoldiers, and the other with ſhips; and the performance of the one does not depend upon the other;



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the doing of the one is not the reward for the doing of the other; but they are diſtinct acts, and each party to do his part; there was alſo a day appointed. And this is not a hard caſe, for they are mutual acts not depending the one on the other. But in our caſe, the money was to be paid for the releaſe; and a vaſt difference. And the ſeven pounds being not to be paid in conſideration of making the releaſe, the words "*in conſideration*" make a condition precedent, which till performed does not entitle the plaintiff to action. Then the ſeven pounds were not demandable here, and conſequently not diſchargeable by the general releaſe of all demands.

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ANOTHER OBJECTION was, That the plaintiff had not averred a releaſe given, or tendered by him, as he ought to have done. But here ſufficient appears that it was done; for he avers performance of all that was to be done on his ſide; and that general averment, though informal, and beſide wants time and place, for which it had been bad on demurrer, is helped by the defendant's paſſing it over and pleading a releaſe, whereby he admits the plaintiff had a * cauſe of action. And there are ſtronger caſes than this in the Books, where pleading over has helped an inſufficient declaration. 3. *H.* 6. 8. Debt upon indentures, in which there was a penalty, in which the defendant did bind himſelf, if he did not perform all the covenants in the ſaid indentures; and regularly in ſuch caſes the way is, for the plaintiff to ſet forth the indentures, and to aſſign breach of one of the covenants in certain; and in debt for the penalty he ſaid generally, that the defendant had broke all the covenants in that indenture, without ſhewing any one in certain; the defendant pleaded a collateral matter in bar; and adjudged the declaration had been bad on demurrer, but that the plea over cured it, though the breach was double and incertain. 9. *H.* 6. 16, 19. And it was ſo adjudged in this court, in *Bernard v. Michel* (*a*). But a full authority is that of *Vivian v. Shipping* (*b*): though they agreed the money awarded was to be paid before the other was to enter into the obligation to the plaintiff; yet the plaintiff did not expreſsly aver payment, but generally, as here, that he had performed all on his ſide; and that was adjudged good after plea pleaded. So we all agree the judgment ought to be affirmed; for there was no money due to the plaintiff till releaſe of the equity of redemption, and therefore none demandable till then, and conſequently a releaſe of all demands could not bar it (*c*).

In *aſſumpſit* on a promiſe that the plaintiff ſhould releaſe his equity of redemption, in conſideration of which the defendant would pay him ſeven pounds, it is ſufficient in aſſigning a breach to ſay, that the plaintiff had performed all on his part, without ſpecially averring *a releaſe* given. 1. Inſt. 147. 1. Vent. 147.

1. Vent. 214.

Vide Yelv. 50.

NOTE: In this caſe COWPER offered this diverſity in relation to mutual promiſes, that where the promiſe is of a valuable thing to the defendant, there ſuch promiſe, without any performance, may be a good conſideration; but where the promiſe is not of a thing valuable, but may be a conſideration, becauſe a trouble to the

(*a*) 1. Vent. 114. 126. S. C. 2. Keb. 764. 766.

(*b*) Cro. Car. 384.

(*c*) The judgment therefore was affirmed. S. C. 2. Ld. Ray. 667.

party

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party promiſing; there ſuch promiſe, without a per cannot be a conſideration, becauſe ſuch promiſe can trouble.

But *per* HOLT, *Chief Juſtice*, No diverſity at all caſes are the ſame upon the learning laid down above.

Caſe 795.

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The deputy of the ſteward of a manor may by writing under his hand authoriſe a perſon to receive the ſurrender of a copyhold eſtate to the uſe of the will of the ſurrenderor, out of court; for although a deputy cannot make a deputy generally, he may authoriſe another to do any *particular act* within the limit of his power as deputy; for the ſteward might authoriſe another to take ſuch a ſurrender, and it is eſſential to the character of a deputy that he ſhould have as extenſive a power as his principal.

S. C. 1. Ld. Ray. 658.
S. C. Comy. 84.
S. C. Salk. 95.
S. C. 3. Salk. 224.
S. C. Holt. 221.

IN ejectment of lands in the county of *Norfolk*, upo miſe of the defendant *Kett*, and "Not guilty" pleade was made by conſent, and it was this:

The lands in queſtion were formerly the copyhold in of *C. Kett*, who by his will deviſed the ſame to * *Elizabet* for life, and after her deceaſe to *Charles Kett* his ſon, a heirs of his body; and if he died under age without iſſue mainder to his own right heirs. *A.* by writing under and ſeal of the lord of the manor, whereof the premiſes cel, was conſtituted ſteward of the ſaid manor, to exerci office of ſteward by himſelf or ſufficient deputy. *A.* *Oſman Clerke* deputy-ſteward; who, by writing under made two other perſons deputies to him, to the intent to ſurrender from *C. Kett* the father, to the uſe of the ſaid power to them two, or either of them, to receive the ſa der; one of whom came to the ſaid *C. Kett*, then ſick i and received his ſurrender. *C. Kett* dies. At the next the manor this ſurrender was preſented by THE HOMAGE ceived. *Elizabeth* the wife is admitted copyhold tenant, ing to the will.

THE QUESTION was, Whether this ſurrender, receive under authority of *Oſman Clerke*, the deputy-ſteward, b ſurrender?

This had been argued ſeveral times at the Bar; Term,

PER TOTAM CURIAM, That as this caſe ſtands, the der was a good ſurrender, was unanimouſly reſolved. queſtions were made:

FIRST, Whether the ſaid perſons appointed by *Oſman* the deputy-ſteward, had a good and ſufficient authority to the ſurrender?

SECONDLY, In caſe the authority were defective, whet defect be not by intent and conſtruction of law, or othe quent act of the defendant, cured and helped? And as matter,

HOLT, *Chief Juſtice*, who delivered the opinion of the argued thus: I AM OF OPINION, the ſaid perſons, deriv aut

writing under the hand of the deputy-ſteward, were ipowered to receive this ſurrender. And I go upon that *Oſman Clerke*, being deputy of the ſteward, is ted with all the power, and may do all ſuch acts as his ld do; for the nature of deputation is to convey all the principal, without any reſervation or reſtriction; nnot inlarge his deputy's power, by giving him a nan he has himſelf, ſo he cannot abridge it by reſerv- imſelf. And this is apparent by the caſe of *Norton v.* here the high-ſheriff conſtituted an under-ſheriff, ſo that he ſhould not ſerve any writ of execution lue of twenty pounds, without leave of the high- the proviſo is held void, and contrary to the deputa- d therefore to be rejected. The * caſe goes further, That if the under-ſheriff had covenanted or given a to the high-ſheriff, not to execute ſuch a writ with- nting him therewith, ſuch covenant, bond, &c. were is being ſo, the queſtion will be, Whether the high- l impower one to receive a ſurrender out of court? ıever doubted but he might: and it is the conſtant ıe whole kingdom; for he that is ſo impowered acts the high-ſteward, but not as his deputy, but only gle act. And a deputy, as hath been ſaid, having with his principal, the high-ſteward here, by making ıs given him all his power; and by conſequence ıppoint one for a ſpecial purpoſe to take a ſurrender

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And this is ſeen every day, for the high-ſheriff, ot make an under-ſheriff if he will, may make his recepts to them: yet if he make an under-ſheriff, of ıſequence he gives him power to make bailiffs and thout acquainting him therewith. And this he can irtue of his deputation; and why ſhall not an under- deputy-ſteward have the like power? But a con- ɛction is made; for in the caſe of under-ſheriff, he ɛ name of his principal; and the deputy-ſteward here ɛe of his principal. *Anſwer.* It is true, the deputy- act in the name of his principal, becauſe the writ is ıe high-ſheriff, and the under-ſheriff acts under the l command of the writ, and therefore muſt act in the to whom the writ is directed. But here the under- under his principal's authority at large. *Vide Comb's* which it appears, that he that acts under another in his name, and that is good law without diſpute; that here *Oſman Clerke* might make uſe of his princi- and it had been well; but the queſtion is, whether it ı his own name; and ſurely it is, upon the reaſon of ɛ. It was a letter of attorney to make a ſurrender in

Deputy ſheriff muſt act in the name of his principal.

If deputy-ſteward acts in his own name, it is good.

(*a*) Hob. 12. (*b*) 9. Co. 75.

the

by *A.* his attorney, &c. and ſo ſhould the ſurrende
have been; but being by virtue of an authority f
pal, it was held well. But in *Comb's Caſe* the au
but that is not done in our caſe. If it had been
" virtue of an authority which I have from *A.* th
" I do appoint ſuch and ſuch to receive the ſur
been well, according to *Comb's Caſe*; but inſtead
upon himſelf, as principal, to give power to acce

Where one has authority, and does an act which cannot be good but under the authority, it ſhall be taken to be under it.

and yet I hold it well enough. For when one ha
and does an act which can be good no other way bu
in purſuance of that authority, it ſhall rather be und
been by force of his authority than void; though i
he takes no notice of his authority: But where one
and an authority together, and he does an act gener
conſtrued in relation to his intereſt, and not to his a
this is the very point of *Clere's Caſe (a)*: he was
three acres of land *in capite*, of equal value; and
ment in fee of two of them to the uſe of his wife f
jointure; and of the third acre to the uſe of ſuch pe
ſons, and of ſuch eſtate and eſtates, as he ſhould de
will; and after by his will deviſes the ſaid third acre
notice taken of his power reſerved upon the feoffm
they had been three acres of land in ſocage, and he h
a feoffment, and after deviſed the third acre, withou
his power, it had paſſed by the will, becauſe then it
paſs by virtue of his intereſt, by the will, or his aut
feoffment; but being *capite* lands, which could no
the authority, becauſe he had paſſed two parts by a
this deviſe was conſtrued to be an execution of his a
cauſe otherwiſe the deviſe had been to no purpoſe
principal caſe, the deputation, or rather authority g
deputy, ſhall be intended to be by virtue of his a
otherwiſe it would be utterly void: and that, though

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ne, as deputy-ſteward, why cannot he appoint another in name to act for him to a particular purpoſe, without notice of his principal? and therefore this ſeems a good n of his authority as deputy, if there be no more in the ut it is objected, that the perſon to whom the ſurrender is by the writing named a deputy; and a deputy cannot deputy, nor can the power of deputy be more or leſs con- n that of his principal. And I agree there cannot be a f a deputy, nor the powe of a deputy abridged. But the deputy" in the inſtrument muſt be o ly conſtrued to ſhew ty's intent to impower him only for this parti ular pur- id beſides there are general words in the inſtrument ſuffi- give authority to accept a ſurrender 3. *Co.* 533 ſeems point, though upon a penal law, inflicting a forfeiture of on any that ſhall land them, without agreeing with the , his deputy or comptroller; and the collector made a de- o made another, with whom an agreement was made, as after adjudged good, not as made with a deputy, but eputy's ſervant; *ſimiliter hic.* And ſuppoſe there were a this power, and it were not good to all purpoſes; yet, as ſtands, is not this perſon a good ſteward *de facto*, as they s to this particular purpoſe, and this act as good as any act vard *de facto?* And I am of opinion it would be good ſo it is agreed a ſteward *de facto* may take a ſurrender, and d *de facto* is in truth no ſteward at all, for he only acts as d ſo did this perſon; and he is in fact and law no ſteward, ct ſhall be judged ſufficient in caſe of a formality, as here, eceive a ſurrender, or be an inſtrument to paſs the eſtate. there is colour of a legal authority; *Oſman Clerke* is agreed good deputy, and takes upon himſelf to appoint a deputy: it is ſo, which he cannot do, no more than an under-ſhe- nake an under ſheriff, or a bailiff make a bailiff; but ſtill a colour, and here is the appearance and form of a legal ng, and he is reputed to have an authority; and in ſuch urrender be taken and duly preſented, it will be well, be- ute. *Moor*, 108. 110. goes very far in this caſe. Two tewards of a manor to execute the office jointly, but not ; and one of them held a court, at which a copyholder itted; and it was adjudged well by the whole court of r, and after that judgment affirmed in the exchequer , as to this point, but reverſed upon another point. And had no more power in that caſe to act, without his compa- n if he had not been named at all; yet becauſe there was and ſhow of a legal court, and a ſurrender made and pre- was held good. And the words of that Book are very for MANWOOD, who delivered the opinion of the Court, urrender was good, took two diverſities. FIRST, Be- rrenders and admittances or grants. If lord diſſeiſor re- rrender, and makes admittance thereupon, it ſhall bind the id the diſſeiſee; but if he make a voluntary admittance

Acts of ſteward *de facto* good. 2. Lev. 184.

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Where there is a colour and ſhow of a legal court, the acts are good.

To a voluntary grant of copyhold, muſt be title to make it good.

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or grant, the diſſeiſee ſhall avoid it. Another diverſit between one that has colour of right, and yet has no rig that has neither colour nor right. If one who has only holds a court, and another ſurrenders to him, it is goo ſuitors make their ſuit to him, they ſhall be diſcharged vice. And he goes further, and ſhews what ſhall be make a colourable ſteward; as where one holds his co contradiction of the lord; or under-ſteward holds a the death of the high-ſteward; or if the lord's clerk hol all theſe are colourable ſtewards; and I think this per as much authority to do what he did, as a deputy to after the death of his principal, &c. And the reaſon o other caſes agrees with this; as AN EXECUTOR *de ſon* but an executor *de facto*, if he do lawful acts with t paying of debts in their degrees, it ſhall alter the prop the lawful executor; as if he pay juſt and honeſt debts ful executor ſhall not avoid that payment; and yet it is by one that has no right: It is true he is not quit again ful executor, but he ſhall maintain trover againſt him ſhall he recover in damage? Only for ſo much as he has and all that he has well applied ſhall be abated in da And what is the reaſon of this? Why, becauſe the mer the goods is that which gives the creditor notice who is and bound to pay the debts; and the creditor is not bo quire into the executor's title; if there be a * colour a ance of it, it ſuffices. If executor *de ſon tort* get thre pounds of the teſtator's goods, and pay it duly to a juſ there the lawful executor, in my opinion, ſhall not even trover againſt the wrongful executor, becauſe it is a good and no prejudice to the executor. So here, there is no pr any, and it is only an act of formality. 2. *Cro.* 552. 1. 130. *Pal.* 20. *The Biſhop of Oſſory's Caſe*; there was a tence of deprivation againſt him, and the ſee full of anot acted *de facto*; and there cannot be two biſhops of a dioc the ſentence of deprivation was ſet aſide as void; yet it ſolved, that all inſtitutions and inductions, &c. by the o biſhop were good, as if done by a rightful one; and ſhal ſame reaſon hold here? Another caſe, ſtronger rather than that of 1. *Leon.* 288. cited at the Bar; my *Lord Darcy* who being lord of a manor, made a ſteward, with power to deputy; and the ſteward, inſtead of making a deputy, ſe ſervant to hold the court, and in that court a ſurrender was and though it was ſaid there, that a ſubſequent act of th amounted to a confirmation, it could not avail as ſuch, were no copyhold tenant before, and in by ſurrender and tance. *Vide* 4. *Co.* 25. And if it works by way of confir it muſt have wrought upon the eſtate granted by the ſurre the ſervant; and yet that ſurrender was not at any real cou

Payment of debts by *tort* executor are good.

3. Cro. 565.

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Acts done by a biſhop *de facto*, as inſtitutions, inductions, are good.

1. Leo. 288.

(*a*) See Anonymous, ante, 441. 2. Term Rep. 100. 3. Term Rep.

: lord's ſubſequent agreement amount to a grant, and he is tenant no otherwiſe than by the ſurrender to the ſervant; y if a ſervant may hold a court to take a ſurrender, he may out of court, and the lord's conſent after could only undefeaſible, but not give a being to his eſtate.

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Lane *againſt* Sir Robert Cotton.

Caſe 796.

ACTION ON THE CASE the plaintiff declared, reciting the e of 12. *Car.* 2. c. 35. by which one general poſt-office, general poſt-maſter are erected, for the ſending of letters he three kingdoms, &c. and alſo the ſtatute of *Jac.* 2. c. *Sir Robert Cotton* was made poſt-maſter by letters pa- he fifth of *May*, in the third year of *William and Mary*, to the ſaid act of 12. *Car.* 2. by which the ſaid maſter er to make deputy and deputies, and other officers and ſer- der them, as they ſhall think fit; that the * ſaid maſter by ents is to obey ſuch rules and orders as ſhall be given he king under THE SIGN MANUAL; and as to the reve- he office, the maſter is to obſerve the order and direction rds of the treaſury; and in the ſaid letters patent the king s, that he ſhall be only anſwerable for ſuch miſcarriage ect as ſhall be his own, and not for that of any other body; he executing of this office an annuity of fifteen hundred -year is granted him out of the profits of the office: That tiff being poſſeſſed of eight exchequer-bills in *London* did iem in a letter, directed to one *Jones*, a goldſmith in *Wor-* id delivered the ſaid letter, with the bills ſo incloſed, to one an officer under the defendant, duly elected to take in, and ut, letters at the office in *London*, to be ſent according to tion; that this *B.* received his ſalary by the hands of the -general; and that the ſaid letter, being ſo delivered to s taken out of the office at *London*, by an unknown hand,

The poſt-maſter general is not liable to an action for the recovery of exchequer-bills contained in a letter and delivered to a clerk at the poſt-office, and loſt from the office (*a*).

* [473]

S. C. 5. Mod. 455. S. C. Salk. 17. 143. S.C. Comy. Rep. 100. S. C. Carth. 487. S. C. 11. Mod. 12. S. C. Holt, 582. S. C. 1 Ld. Ray. 646.

queſtion was, Whether an action lay againſt the poſt- or not?

AS ARGUED *for the plaintiff*, the office of poſt maſter was nt common-law office, but exerciſeable by any, and as would take it upon themſelves; againſt whom any perſon emedy for any damage that happened through their default; the law before the ſaid ſtatute, whereby one general poſt- s appointed, but not by way of creating a new office, but one public office of all the prior private ones. And the end by the parliament in ſo doing, as the act tells us, was a edy and ſafe conveyance of letters. So that this being an

(*a*) It has alſo been decided, that an action will not lie againſt the poſt-maſter for a Bank-note ſtolen by one of the ſorters out of a letter delivered into the Poſt-office, Whitfeld *v.* Lord Le Deſpencer, Cowp. 754.

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antient common-law office, ought to be governed by the ſame law with other common law offices; and therefore the poſts, whether private or public, are to be conſidered as common carriers of ſmall packets; and conſequently liable to make ſatisfaction for miſcarriages, as other common carriers. And that the ſtatute meant to make them liable, appears by its ſaying the office is made public for greater ſafety: And ſince before, the party that ſent letters by a private poſt had the ſecurity of an action againſt him if he miſcarried, of neceſſity that remedy ſtill continues in like manner againſt the poſt-maſter general, or elſe the preamble of the ſtatute were falſe. By the ſecond ſection of the ſtatute it is ordained, there ſhould be one maſter, or general officer, who from time to time * [474] ſhould have the ſending of all letters and packets, &c. to * their ſeveral addreſſes; from whence I infer, Firſt, That *all* letters are to be ſent by him. Secondly, That he is an officer. By the eighth ſection, none but the maſter general, or his deputy, is to receive or carry letters by the ſea or land, or hire horſes or boats for that purpoſe; the act does not ſay that none ſhall carry letters but the maſter, or other officer put under him by the king; but, by *him* authoriſed. *Vide* ſ. 2. and 10. By the fifteenth ſection he is bound to find poſt-horſes, under pain of five pounds for every failure; which ſhews that he is to anſwer for his under-officers; and in the letters patent, whereby the defendant is nominated, there is a covenant from the king, that the defendant ſhall not anſwer for the default of any but his own; which ſhews, he apprehended himſelf liable for thoſe of his officers, and therefore provided againſt it by the covenant. And it is no reaſon to ſay, that the under-officers are the king's ſervants, and not his, becauſe the king, and not he, pays them; for that is not ſo by the act of parliament, but only by a private agreement between the king and him; and ſuch agreement cannot deprive the ſubject of a benefit which the law gives him. The ſheriff, who by law is obliged to take upon him his office, is anſwerable for the miſcarriages of his under officers; *à fortiori* in this caſe, where one is not compellable to take the office upon him; and it is for this reaſon that a grant of the office of a county clerk by the king is void. 4. *Co.* 32. Then there is a manifeſt neglect in the defendant; for by the ſtatute, the maſter and his ſervants are to ſend letters and packets to their directions; and it is part of the caſe, that the letter in queſtion was delivered to the perſon appointed to receive letters in the office, which is the ſame thing as if it were delivered to the defendant himſelf; and his duty was to ſend it, wherein he failed; for it is agreed it was taken by a ſtranger out of the office. Beſides, the letter was given to be ſent, and he received it ſo; and his receiving to ſend, was to ſend ſafely, according to *Southcoat's Caſe*, 4. *Co.* And it is upon this reaſon, that all tradeſmen are obliged to do things carefully and ſkilfully; and if they fail therein, caſe will lie againſt them; for the very taking upon them to do it is a taking to do it carefully and well: And if it be ſo in every private perſon's caſe, *à fortiori* it will be ſo in the caſe of a public officer, whom one is compellable

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e to uſe. And upon this reaſon alſo it is, that * caſe lies againſt eriff for the eſcape ſuffered by his bailiff; much a harder caſe the preſent. By the ſame reaſon the defendant, having taken himſelf this office, has alſo taken upon himſelf to do it care-; but inſtead of that, the letter is taken away in the very of-where none could come without his leave. And if this be ugh the neglect of him, or his ſervants, he ought to anſwer t; like the caſe of an inn-keeper, who ſhall anſwer for his unt's neglect. It is objected, the king has all the revenue of the e, and the maſter but a ſalary inſufficient to anſwer caſualties his kind. *Anſwer.* It was his folly to take the office upon terms. And this is a ſtronger caſe againſt them than that of 202 for here it does not appear that any trick was uſed to he letter from them, or that they uſed convenient care. If maſter be not liable to our action, we have an injury done us no remedy for it: We have it not againſt the king, for he is to nominate this officer; and the under-officers are only ſer-s, and accountable to their maſter only. And then the conſe-ce would be very dangerous both to the king and ſubject: for he act none can ſend letters by any private poſt; and if one ot ſend his letters but by one hand, and that he may with im-ty embezzle all letters, farewel to all trade and commerce, of which chief ſupports is correſpondence by letters; and what be more fatal to the revenue than a decay of trade?

' WAS ARGUED *on the other ſide*,

IRST, That *exchequer-bills* were not ſuch things as the poſt-er was, by the duty of his office, obliged to take in.

ECONDLY, That by the act he is not bound to make ſatisfac-for every particular man's loſs in the things within the ex-of his office.

HIRDLY, That in this caſe he is not anſwerable.

HE FIRST depends on the conſtruction of the ſtatute, what it ids to be ſent by poſt; and the ſtatute intended a maintaining rreſpondence at home and abroad; and that by carrying of s, not goods or money, for that is not neceſſary for mutual ſpondence. Indeed, whatever thing, by the intent of the e, is within the office of the poſt maſter, is not to be done y other; but without doubt any other may carry money or , without offence againſt the ſtatute; *ergo* ſuch things are within the extent of the poſt-maſter's office; and a carrier carry a letter along with goods. Now exchequer * bills are ſame nature with money, and current as ſuch; and by con-ce may be ſent with a letter by a carrier: *Ergo* not within ty or extent of the poſt-maſter's office; and ſo may as well poſt-maſter is bound to ſend jewels. And it would be a onſtruction that the maſter ſhould carry exchequer-bills, for eaſons. FIRST, He muſt ſend his packets by day and night, *[476]

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for the ſpeed required by the ſtatute. SECONDLY, He muſt t boys and indigent people, whoſe poverty will make them obnoxi to temptations; for none of ſubſtance or ability to give ſecu will undergo ſuch ſlavery. THIRDLY, It is impoſſible for to ſend ſufficient guard, from the ſmallneſs of the *præmium*, diſpatch they muſt go with, and incertainty of wind and weat therefore, from the nature of the thing, the parliament intende office for ſuch things as in their nature might be ſent with ſpeed ſafety, which exchequer bills, being current as money, are There is a clauſe in the ſtatute which ſhews it intended not things of value ſhould be ſent by the poſts; for it ſays ſuch th might be ſent by meſſengers; and bills of exchange are the things which may ſeem of value that it mentions might be ſen it: But the reaſon of that is, becauſe, Firſt, It was very venient for trade. Secondly, There was no danger in it; when this ſtatute was made, bills of exchange were payable third perſon, or order, and if they were foreign bills, there letters of advice; ſo there was no temptation of ſtealing them, by conſequence no danger.

SECONDLY, If we conſider the ſmallneſs of the *præmium*, find it bears no proportion with the riſque he would run if he liable for miſcarriages; which is a demonſtration the parliar did not intend he ſhould; for they do not proportion the *præ* according to the value of the thing ſent, but according to weight and diſtance of place. And there is a clauſe, that price ſhould not be enhanced upon account of bills of excha which plainly ſhews they did not intend he ſhould anſwer f miſcarriage of them. The ſtatute impowers him to ap agents and deputies all over the world; and the argument would make him liable for the miſcarriages of them. And conſtruction would deſtroy the office itſelf. There is no co riſon between the office of carrier and this: a carrier is not b to travel but by day, and if he be robbed he has his remedy He himſelf may travel * with his waggon in perſon. If a t of value be ſent, he may make his own price, according to riſque he runs; whereas the poſt muſt travel by night, truſt puties, has no remedy over if he be robbed by night, and ca inſiſt upon a price, but what is cut out by the ſtatute. is not like the caſe of a maſter of a ſhip, who is anſwe to the owners for damage done by the ſeamen to their goods; cauſe, Firſt, He is there in perſon, to ſee and correct wh amiſs. Secondly, That is upon a particular contract between and the owner, according to the maritime law; and he may d whether he willl go or not, if he does not like his reward; in our caſe, one may ſend one thouſand pounds worth of e quer-bills, and the maſter know nothing of it. Nor is it lik caſe of a ſheriff, who though liable to ſerve againſt his wil muſt anſwer for eſcapes of his officer. For, Firſt, He is an able only for the affairs of one county. Secondly, He may the *poſſe com.* to ſecure his priſoners.

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IRDLY, This letter was taken out by an unknown perſon, it muſt be underſtood to have been forcibly and againſt ll; and if ſo, we would not be anſwerable, no more than a would be to his principal for what he is robbed of.

TURTON, POWIS, and GOULD, *Juſtices*, were of opinion that ion did not lie againſt the maſter, becauſe this was not like n-law offices, in which the ſuperior anſwers for the inferiors ervants; but this was an office newly created by act of parlia-

, as GOULD, *Juſtice*, called it, founded in government, in which each had a diſtinct branch to exerciſe; yet with nation and dependancy on the chief maſter, but not as ſer- but by the very conſtitution and erection of the office; s by act of parliament, to which every one is conſenting; ſaid, every one of theſe, in his own peculiar ſtation, was h an officer *pro tempore* as the maſter; and compared it rporation, in which the head is over the reſt, yet not an- le for the miſcarriage of an inferior member. 1. *Edw.* 5. 5.

TURTON, *Juſtice*, and HE agreed, that exchequer bills ot things proper to be ſent by poſt; and they alſo all agreed ſons before offered for the defendant.

POWIS, *Juſtice*, held, there were ſufficient words in the comprehend exchequer-bills.

T, *Chief Juſtice, cont.* argued thus: Notwithſtanding what en ſaid at the Bar by MR. ATTORNEY, (ſince Chief of the Common Pleas), *my brother WRIGHT (ſince Lord), and COWPER, *King's Counſel*, and by my three Bro- n the Bench, I am of opinion that the plaintiff ought to dgment. * [478]

IS CASE is comprehended in a narrow compaſs. Before I y reaſons, it will be proper to obſerve upon what points I inſiſt on. And for that it is to be conſidered, that it is of the queſtion here, whether if a letter be put into the d ſent ſafely out, and THE MAIL on the road is robbed, or her miſchance happen whereby the letter is loſt; whether, he poſt-maſter be liable in that caſe is not the queſtion r that is merely foreign, and deſerves a ſeparate conſidera- But as this caſe ſtands now before us, where a letter is ed to the proper officer in his office in *London*, and there the very office, though no diverſity has been taken between vo caſes, either at Bar or the Bench, yet I think them dif-

There is reaſon the maſter ſhould anſwer for the miſcar- f any letter or packet that is loſt in the office, though not y delivered to him, but to his ſervant; becauſe by the ation of the office he is entruſted with the profit and inte- the ſubject; and a truſt is repoſed in him, for the diſcharge ch he has a certain duty or ſalary. He is made a public by act of parliament, "That there ſhall be one general poſt-

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maſter." And it is plain the ſtatute deſigned this for the benefit of the ſubject, as appears by the preamble thereof; and this was a matter of general concern for trade and commerce, and to the end that ſpeed and ſafe diſpatch ſhould be had of letters and packets which, in the judgment of the parliament, was more likely to be had, by making one general office and officer; ſo it appears to have been done for the more benefit and ſafety of the ſubject. Secondly, This office is fixed at *London*, which is the center of buſineſs, from which all letters are ſent, and all letters are to come, ſo there is a certain place ſettled where this office is to be. Thirdly, It is an office of care, and that care is committed to the poſt-maſter, that none but he, his deputy or ſervant, &c. is to take, receive, or ſend any letter, except ſuch as may be ſent by the carrier, coach, &c. as the act directs. So there is one man ſet up, and all the reſt to be his deputies or ſervants; ſo that, from the nature of the truſt, he is bound to keep ſafely in his office all letters and packets delivered in there at his peril, becauſe it is a truſt * repoſed in him by act of parliament, that is by law. This office is not at all diſtinguiſhable from that of marſhal of this court, or of warden of the *Fleet*, who are entruſted with ſuch offices by common law; and it is no excuſe for them to ſay that their priſons were opened by unknown perſons, though it be by people in open rebellion, as in the caſe of 23. *Hen.* 6. 1. the caſe of the *Duke of Norfolk*; and the reaſon is, becauſe it is a truſt by law in a public officer, and it being done under a government in which it is ſuppoſed he may have a remedy over, at leaſt ſuch remedy as the law allows, though the wrong was by perſons in open rebellion; and there it was held, that debt lay againſt the gaoler for ſuch an eſcape upon the ſtatute of 2. *Rich.* 2. This was the caſe at common law, where a *capias* only lay for damages in treſpaſs, but not for any action of debt, till 25. *Edw.* 3. c. 17. 3 *Co.* 12. And upon this ſubſequent act, which gives *capias* in debt upon a judgment in it, if the ſheriff ſuffer one in execution on ſuch *capias* to eſcape, debt will lie againſt him for it, though at common law, which made ſheriff liable for eſcape, where *capias* then lay, no ſuch proceſs as a *capias* on a judgment in debt was known: and he is as much bound to keep thoſe that are in for debt ſince that ſtatute, as thoſe who were in for damages in treſpaſs before; and ſo is the law upon a *levari facias*. By the ſtatute of *Weſtminſter the Second*, c. 18. an *elegit* is given; and if ſheriff take goods upon an *elegit*, he ſhall be liable to anſwer for them, if they are reſcued, as if they had been taken upon the common-law proceſs of *levari facias*. Upon the ſtatute of 13. *Edw.* 3. *de Mercatoribus*, the ſheriff is liable for goods which he takes in execution by *extendi facias*, by conſequence of law merely, for ſuch a thing was not before that ſtatute. Then what difference can be made between the marſhal of this court and warden of the *Fleet*, and this officer? for the maſter is to keep the letters ſafe till he ſends them

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ut, as the gaoler is to keep his priſoners till they are legally diſcharged out of his cuſtody.

Another reaſon why the maſter ſhould be liable here is, becauſe he ſubjects pay a reward for keeping and ſending away their letters, and this reward is paid to one who makes it his buſineſs and employment to take and ſend letters and packets delivered to him; and wherever a man takes upon himſelf the exerciſe of an office, the exerciſe whereof is for the benefit and advantage of the public, and takes a reward for the ſame, he ſhall be anſwerable at law for any * harm the ſubjects receive by his ill adminiſtration of that office or employment, and for all events and chances, even from thieves and like malefactors, 2. *Cro.* 188. If goods be left with an innkeeper by one who is no gueſt or traveller, and they are loſt, he ſhall not anſwer for them, becauſe he has no benefit for the keeping, and it is not his employment to keep ſuch; but if a horſe be left in his ſtable, and he is loſt, he ſhall anſwer for it, becauſe he receives profit thereby, ariſing from the meat conſumed by the horſe. And *Hob.* 80. in the action againſt the hoyman, which is the firſt of the kind to be met with in Books, is upon that reaſon, becauſe he had a hire for it.

Where a man takes upon himſelf an office for the benefit of the public, he is liable for it.

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Innkeeper liable for goods of a gueſt only.

My *Brother* GOULD ſays, This is an office founded in government: if he means that it is an office created and framed by law, he ought to make a quite contrary concluſion; for ſo is the office of a marſhal: and yet he ſhall anſwer for eſcapes: and ſhould not it be ſo too in caſe of an officer created by act of parliament? for the one and the other are by law, the one and the other for the benefit of the ſubject; in the one caſe, the priſoners to be kept for their benefit to have their debts paid; in the other, that their letters be ſafely kept and ſent away with ſpeed; and why then ſhould the officer in one caſe be anſwerable to the ſubject for his neglect or default, and not in the other? And ſince then he is intruſted with this office for the benefit and advantage of the ſubject, whatever conſequential damage befalls the ſubject through his neglect, he ought to anſwer for it.

Another reaſon of *Brother* GOULD againſt the action was, That if it did lie, it muſt be upon a contract expreſs or implied; and truly I do not think that, but that he is chargeable by the law and the nature of his office.

ANOTHER OBJECTION was, That the reward does not go to the defendant. Whoever gives a reward to have a thing done for him, ought to have a remedy if the thing be not done; and when a reward is given to an officer of public truſt, that intitles the party to a remedy if he be grieved through neglect, or other fault of ſuch officer; and if he ought to have ſuch remedy, ſurely muſt be againſt him who received his reward. And is fifteen hundred pounds a-year ſo ſmall a *præmium* as not to encourage thoſe that enjoy it to be more diligent in the execution of their office, ſo at leaſt as to ſuffer no neglect within the very

very walls of the office, as it was here? And though all the ſalary or revenue of the office goes not to the defendant, yet his
* [481] ſalary is to be paid out of the revenue of the office *. And there is no diverſity between this caſe and the caſe of *Meſſe* and *Slew* (*a*), which was thus: Goods to be tranſported to foreign parts were ſhipped in the River *Thames*; and there were a competent number of men on board for ſailing the ſhip, but they were in the river overpowered and robbed; and the queſtion was, Whether an action would lie againſt the maſter of the ſhip? And at a trial at Bar the ſpecial matter was found, and in arreſt of judgment this very exception was taken to excuſe the maſter, that he did not receive the hire, but the owners did, and the maſter had only a ſalary from them. But it was reſolved againſt him, FIRST, Becauſe he was a public officer: SECONDLY, Becauſe his ſalary was part of the hire, and did ariſe for the care and diligence that ought to be taken for the ſafe cuſtody of the goods. And ſo here the poſt-maſter is a public officer, and he has a ſalary from the profits of the office. My Brothers have taken a difference between the two caſes; for that in the caſe of the maſter of a ſhip he might have taken precaution, which poſt-maſter cannot do. But what caution could there be uſed in one caſe and not in the other? It is true, it is ſaid in that caſe, that if the owners of the goods had brought them before ſuch time as was convenient before the ſhip was ready to ſail, he might refuſe to receive them; and that may be: and it is ſo in the caſe of a carrier, if goods be brought to his inn before the convenient time for him to be gone, he may refuſe to take them; but in both caſes, if one whom they entruſt to receive goods before ſuch convenient time receive goods, and they be loſt, the carrier ſhall anſwer for them, and ſo ſhall the maſter. But no man ſhall by law juſtify to deny the duty of his office, for there is a perpetual obligation upon them to keep the things to them committed, till they have diſcharged their truſt; and when they have done, and no ſooner, are they diſcharged. This caſe is within the ſame reaſon of juſtice and equity of law upon which all actions of this nature are brought; and it has all the ingredients whereby one is made reſponſible in like caſes for negligent keeping of goods; for what is the reaſon that a carrier or innkeeper is bound to keep ſuch goods as he receives at his peril? It is grounded upon great equity and juſtice; for if they were not chargeable for loſs of goods, without aſſigning any particular * default in them, they
* [482] having ſuch opportunity as they have by the truſt repoſed in them to cheat all people, they would be ſo apt to play the rogue and cheat people, without almoſt a poſſibility of redreſs, by reaſon of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one

(*a*) In the King's Bench in Hilary Term, 24. *Car.* 2. but entered Mich. Term, 23. *Car.* 2. Roll 421. Reported 3. Keb. 72. 112. 135. 1. Vent. 190. 238. Raym. 220. 1. Mod. 85. 2. Lev. 69. 2. Keb. 866.

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think it a hard caſe that a poor carrier who is robbed on the without any manner of default in him, ſhould be anſwerable ll the goods he takes; yet the inconveniency would be far intolerable if it were not ſo, for it would be in his power mbine with robbers, or to pretend a robbery or ſome other ent, without a poſſibility of remedy to the party; and the law ot expoſe him to ſo great a temptation, but he muſt be ho- at his peril. And this is the reaſon of the civil law in this which though I am loth to quote, yet inaſmuch as the 2. Bl. Com. 451, of all nations are doubtleſs raiſed out of the ruins of the civil as all governments are ſprung out of the ruins of the *Ro-* empire, it muſt be owned that the principles of our law are wed from the civil law, therefore grounded upon the ſame n in many things (*a*). And all this may be, though the non law be time out of mind. And it is to be doubted that was intelligence given here, that there were chequer-bills is letter, otherwiſe it is improbable this letter ſhould be d out from all the reſt. I do not here arraign the integrity e gentlemen that manage the office, but we muſt here con- the whole maſs of mank nd, and though theſe are worthy ns, yet bad may ſucceed them, who may ſearch and open s letters, and none be the wiſer, or able to fix it upon them; ; tranſacted in their own office, and lying only in the offen- privity, who thus may with impunity abuſe the truſt repoſed in And a common carrier, or innkeeper, or maſter of a ſhip, muſt anſwered. And in the caſe of *Moſſe v. Slew*, it appeared the lant was guilty of no particular default, for a power came him and robbed him; but ſurely more care might have been in this caſe, for if *Breeſe* had done his duty, the bill could ave been taken out of the letter in the office. And the ty between the caſe of a common carrier and this, upon ac- of the carrier's having a remedy againſt the hundred if he bed, it is none at all in the reaſon of the thing; for before medy was given, which was only by the ſtatute of *Win-* , the action did lie againſt him; and yet he had no remedy ainſt the robbers, if he could catch them, and the maſter like remedy here: and even now they are without remedy e caſes upon the ſtatute of Stannaries, other than againſt the r wrong-doer. As to the caſe of an innkeeper, this diver- offered between it and this; for that it is within his houſe, is his caſtle, and he may make his ſervants watch all but ſurely they do not conſider that theſe bills were loſt the walls of the office in *Lombard-ſtreet*, which is likewiſe fendant's caſtle, and that he may keep his ſervants up all f he pleaſes: and the care in keeping up his ſervants to if notwithſtanding that a misfortune ſhould happen, ought to diſcharge than to charge him; and therefore no more the one ſhould be bound than the other. The caſe of the

Action lay againſt carrier, before the law gave him remedy againſt the hundred.

* [483]

Co. Lit. 89. 1. Term. Rep. 27.

(*a*) See Juſtinian's Inſtitutes, book 4. title *De Lege*, 5.

innkeeper

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innkeeper is much a ſtronger caſe, for he is bound to receive all manner of people into his houſe till it be full, but the poſt-maſter need let none into his office but ſuch as he pleaſes. As to the caſe of *Herbert* v. *Page* (*a*), an action brought againſt him for ſuffering a raſure to be made in a record in his cuſtody, and it was thought *prima facie* the action lay; but on better conſideration, inaſmuch as it appeared that he had not the ſole cuſtody of them, but that ſtrangers of right had acceſs to them without his permiſſion, the plaintiff was barred: but here the poſt-maſter had the ſole cuſtody, and nobody had liberty to come into the office without his leave. I am apprehenſive here ſome may think I would carry this point farther than I have already declared, by comparing it to the Carrier's caſe; and that by the ſame reaſon an action would lie if the letter had been loſt upon the road. But I do not mean any ſuch thing, for I would not give any opinion either the one way nor the other in that caſe, for it is a thing that probably may come in queſtion hereafter: but let that be as it will, there is a difference between that caſe and the preſent, for the carrier receives the goods to carry ſafely, and the poſt-maſter the letter to ſend ſafely, and thoſe are the words of the act; and I wonder no diverſity has been taken between the caſe of a letter loſt in the office and loſt on the road, being ſent ſafe out of the office, for there ſeems to be a great deal of difference; and it may be a queſtion, upon the * words of the ſtatute, whether when the maſter ſends the letter ſafely away he be not diſcharged? Suppoſe then he was not chargeable in caſe of a robbery on the road, it will not follow from thence that he is not bound to keep a letter ſafe in the office. And in the caſe of *Mace* v. *Slew*, if the ſhip had been robbed at ſea, the maſter had not been anſwerable, yet he was chargeable at land; ſo here, though he may not be chargeable for a robbery on the road, he may for a loſs in the office. If a man bring a horſe to an inn, and deſire the maſter to put him into a ſtable till it cools, and then ſend him to graſs; if the horſe be ſtole before he ſends him to graſs, he ſhall anſwer for him; though if he had ſent him to graſs purſuant to the owner's deſire, he would not be anſwerable; and ſo he ſhall be chargeable till he has performed the truſt repoſed in him, and as ſoon as he has performed it he ſhall be diſcharged. So here perhaps, if the letter had been ſent away ſafe out of the office, he had performed his truſt, and had been diſcharged; yet it will lie as the caſe is, where he has not performed his truſt by ſafely ſending it out.

Difference between letter loſt in the poſt office and on the road.

* [484]

Then by the duty of his office he is to take chequer-bills, though this has been denied by MR. ATTORNEY and my two Brothers; but it is his duty to receive them for theſe reaſons: FIRST, By the words of the act he is to receive any "letter, packet, or thing proper to be ſent by poſt." SECONDLY, This is a thing proper to be ſent by poſt. As to THE FIRST, Where-

(*a*) Sid.

ever

any ſubject takes upon himſelf a public truſt for the benefit
he reſt of his fellow-ſubjects, he is *eo ipſo* bound to ſerve the
ect in all the things that are within the reach and comprehen-
of ſuch an office, under pain of an action againſt him; and
hat ſee *Kelway* 50. If on the road a ſhoe fall off my horſe,
I come to a ſmith to have one put on, and the ſmith refuſe
o it, an action will lie againſt him, becauſe he has made pro-
on of a trade which is for the public good, and has thereby
oſed and veſted an intereſt of himſelf in all the king's ſub-
s that will employ him in the way of his trade (*a*). If an
eeper refuſe to entertain a gueſt where his houſe is not full,
ction will lie againſt him (*b*), and ſo againſt a carrier, if
horſes be not loaded, and he refuſe to take a packet proper
e ſent by a carrier; and I have known ſuch actions main-
ed, though the caſes are not reported. And why ſhould
an action lie againſt a poſt-maſter here, if he ſhould refuſe to
in a letter, or * any other thing proper to be ſent by poſt?
doubtleſs an action would lie in that caſe. If the inn be full,
the carrier's horſes laden, the action would not lie for ſuch re-
; but one that has made profeſſion of a public employment,
ound to the utmoſt extent of that employment to ſerve the
lic. Surely then where it is a public employment created by
the obligation is the greater; as if the ſheriff refuſe a writ,
ction will lie againſt him, becauſe the law charges him with
employment for the conveniency and good of the public;
re the law, viz. an act of parliament, charges the poſt-maſter
an employment for the good and convenience of the public;
fore the reaſon it he ſame. As to THE SECOND, Theſe che-
-bills are proper to be ſent by the poſt, for the act does not
ne what things are to be ſent, but leaves it very general;
es not mention any ſpecies, but any letter or packet whatſo-
; then it is plain the act meant other things than letters or
ets of letters ſhould be ſent, for the prices are different, for
is ſo much a ſheet for letters, and ſo much an ounce for
things, as packets of writs, deeds, or other things; which
s are as general as may be: ſo the prices are varied from
for letters, and any thing whatſoever that may be ſent by poſt.
all things, which by their nature may be ſent with diſpatch,
without danger of hurting the horſes, are proper to be ſent
oſt, of what nature ſoever they be; and nothing can be more
ble than chequer-bills, for a ſmall packet of them may con-
o the value of ten thouſand pounds.

IS OBJECTED, That they ought not to be ſent by poſt,
ſe they are new things, created long after the act for erect-
he poſt-office.

ANSWER, They are within the reaſon of other things which
in eſſe, and within the act when it was made, 4. *Co.* 4. *a. b.*

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If ſmith refuſe to ſhoe a horſe, action lies.

If carrier refuſe to take goods, the horſes not being loaded, action lies.

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If ſheriff refuſe a writ, action lies.

Keilwood, 50. pl 4. 432. 1. Vent. 333. 3. Bl. Com. 165, 166.
Dyer, 158. Godb. 346. Moor

No

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No agreement made before or after marriage barred a woman of her dower, though ſhe accepted what was agreed on after the death of the huſband; but the ſtatute of 27. *Hen.* 8. c. 10. makes eſtates for life of the wife, to take immediately after the death of her huſband, to be a bar of dower, if it be made in ſatisfaction of her dower. And at the time of making that act, no land of freehold or inheritance was deviſable but by ſpecial cuſtom; and after by the ſtatute of 32. *Hen.* 8. they are made deviſable. If ſuch huſband, whoſe wife is entitled to dower, deviſe land to her in ſatisfaction of dower, and ſhe accept of it after his death, though it be a thing not known or *in eſſe* at the time of making the ſtatute of 27. *Hen.* 8. that makes a jointure a bar of dower; yet being within the ſame reaſon with other jointures mentioned in that ſtatute, it is judged to be a jointure within it. And by the ſame reaſon, if chequer-bills be as proper to be ſent by poſt as other things that were in being at the making of the ſtatute of 12. *Car.* 2. though chequer-bills were not then known, yet they ſhall be within the ſame reaſon, and the poſt as much bound to take and ſend them as any other thing whatſoever. Another inſtance of the like is in the ſame caſe in 4. *Co.* by the *ſtatute of Marlbridge*, made the 52 *Hen.* 3. A man ſeiſed in fee, infeoffing his ſon and heir to defraud the lord of his wardſhip, the feoffment is made void, as to the lord. And by 1. *Rich.* 3. c. *ceſtuy que uſe* has power to make a feoffment of the land out of which the uſe ariſes; by 4. *Hen.* 4. c. the heir of *ceſtuy que uſe* ſhall be in ward; and if, ſince that ſtatute, *ceſtuy que uſe* make a feoffment by virtue of 1. *Rich.* 3. c. to his ſon and heir, it ſhall be void by the *ſtatute of Marlbridge*, made two hundred years before; and it will be as good an argument to ſay, that if one come by the chequer-bill of another unlawfully, that trover will not lie for it, for that they are new things; as that they ſhall not be ſent by poſt, becauſe they are new things. But when an act of parliament creates a new intereſt, it ſhall be governed by the ſame law that like intereſts have been governed before.

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Where an act of parliament creates a new intereſt, it ſhall be governed by the like law ſuch intereſts were governed before.

IT HAS BEEN OBJECTED at the Bar, That the poſt-maſter is not bound to anſwer, FIRST, For bills of exchange payable "to "bearer;" becauſe it was the party's folly to make them ſo payable. SECONDLY, He is not liable for the loſs of them, though made payable the ordinary way, *viz.* "to ſuch a man "or order," becauſe he is to have nothing for them as ſuch, no hire or poſtage. As to THE FIRST, A bill of exchange payable to bearer is lawful; and it is prudence in any man that has a mind to negotiate a bill of exchange, to get it drawn in that form, for then it needs no indorſement, and by conſequence, if he does negotiate it, ſhall not be chargeable; whereas, if it were made payable to one or order, for every negotiation there muſt be a new indorſement, and every indorſer is become liable *in infinitum*. And all bills, without exception, are to be ſent by poſt, and this ſort of bills, being lawful, may therefore be ſent.

But

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But they pay no reward for ſending or carrying them; there- the poſt-maſter ought not to anſwer for a miſcarriage of

ſwer. Whoever writes or ſends a letter with a bill of ex- ge in it, it ſhall be intended that the letter was writ and ſent ne ſake of the bill, and therefore though the poſt do not re- : an immediate direct reward for the bill, yet it receives a ate conſequential one; as in the caſe of an innkeeper, a paſ- er pays nothing for the keeping of his goods in the inn, but only for his victuals and lodgings, and the reward which he for his victuals and lodgings intitles him to an action for the f his goods. Beſides, chequer-bills are not exempt from pay- and without doubt if a man ſends a great packet or bundle em, he is bound to pay according to the bulk of his packet. ſuppoſe nothing were due for chequer-bills, no more than to eriff for executing a writ of execution; yet if the goods ſo n in execution be loſt, he ſhall anſwer for them, he being a ic officer for that purpoſe. And there never was an inſtance, an officer intruſted by law with the goods of a ſubject, but if he loſe them, the officer by conſequence of law was liable hem. And *Southcot's Caſe (a)* is very ſtrong, though, by the hat caſe, as reported there, is not all law; but where there is cial undertaking to keep the goods. For if there be but a ral bailment, and a general acceptance, and ſo the matter left conſtruction of law thereupon, how the goods ſhall be kept; aw will make conſtruction, you ſhould keep them as you do own: but where there is a ſpecial acceptance to keep them , there, at your peril, you are bound by your ſpecial accep- : to keep them ſafe, though you have no reward, and that you ot compellable by law to take them; which is ſtronger than caſe *(b)*. But when goods are given to an officer of law, y there it muſt be intended that they are to be ſafely kept; herefore he ſhall be charged. And I do not think there can caſe put, where a public officer, or his deputy, was ever diſ- ed in caſe againſt him for a miſcarriage in them for goods, ier things, loſt through their neglect.

other reaſon to charge the defendant is, becauſe before the ſta- f 12. *Car.* 2. the ſubject had liberty to ſend his packet by any poſt-maſter he pleaſed, of which there were many in thoſe it being then lawful * for any man to ſet up ſuch an office. * [488] f ſuch, as had ſet up ſuch an office then, had been robbed, the t would have had his action, and recover againſt them, as as againſt a common carrier; and this is admitted by the ſide. So it is very reaſonable, that thoſe that take it now l take it upon the ſame terms it then ſtood; and the office

. Co. 83. reported in *Cro. Eliz.* 816.—NOTE *to* AND NOTE, This caſe is better *former edition.*

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is not new, but only, that inſtead of being exerciſed by many before, it is now exerciſed only by one; and all perſons by this act are forbid to uſe any other poſt, or to ſend by any but by this one that is to be by letters patent under the great ſeal. And the poſt-maſter was, as I ſaid, chargeable at common law before, and the employment is now the ſame that it was then, only that of being exerciſed by one perſon; therefore every thing that was incident to it then remains ſo ſtill. And ſince the ſubject is deprived of his election of truſting whom he pleaſed with his letter, ſurely to compel him to ſend by one againſt whom he ſhould have no remedy, would be the moſt unreaſonable thing in the world, and the moſt unjuſt conſtruction upon the ſtatute.

It was objected at the Bar, That they have this remedy againſt *Breeſe*. I agree, if they could prove that he took out the bills, they might ſue him for it; ſo they might any body elſe on whom they could fix that fact; but for a neglect in him they can have no remedy againſt him; for they muſt conſider him only as a ſervant; and then his neglect is only chargeable on his maſter, or principal; for a ſervant or deputy, *quatenus* ſuch, cannot be charged for neglect, but the principal only ſhall be charged for it (*a*); but for a miſfeaſance an action will lie againſt a ſervant or deputy, but not *quatenus* a deputy or ſervant, but as a wrong-doer. As if a bailiff, who has a warrant from the ſheriff to execute a writ, ſuffer his priſoner by neglect to eſcape, the ſheriff ſhall be charged for it, and not the bailiff; but if the bailiff turn the priſoner looſe, the action may be brought againſt the bailiff himſelf, for then he is a kind of wrong-doer, or reſcuer; and it will lie againſt any other that will reſcue in like manner; and for this diverſity, vide 1. *Leon.* 146 3. *Cro.* 175. 143. 41. *Ed.* 3. 12. 1. *Ro.* 78. which is not well reported, but the inference may be well made from it.

A ſervant not chargeable for neglect, only for miſfeaſance.

And here the defendant hath the power in him to manage the office by himſelf, his deputy or ſervant; and every deputy or ſervant is by him that puts him in, and therefore he ought to anſwer for him; and the reaſon why a * principal ſhall anſwer for his deputy is, becauſe as he, as principal, has power to put him in, ſo he has power to put him out, without ſhewing any cauſe; and that, though he had expreſsly given him an eſtate for life in the deputation. *Vide Hob.* 13. *Alo.* 856. 39. *H.* 6. 34. And the deputy or ſervant may bring a greater miſchief than this comes to upon his principal; for if one has an office of inheritance, in its nature forfeitable for ſuch and ſuch offences, or miſdemeanors, and he puts in a deputy who commits ſuch acts as would be a forfeiture in the principal if he had done them, he ſhall forfeit the office for his principal. 39. *H.* 6. 34.

* [489]

(*a*) See the caſe of Stone *v.* Cartwright, that no action lies againſt a ſteward, manager, or agent, for damage done by the negligence of thoſe employed by him in the ſervice of his principal; but the principal, or thoſe actually employed, are only liable. 6. Term Rep. 411.

The

LANE *againſt* SIR ROBERT COTTON.

'he caſe in *Dy.* 238. to my great wonder has been quoted by my *ther* GOULD as an authority for him, for it is directly againſt ; by the 3. *Hen.* 6. *c.* 3. any cuſtomer that ſhall conceal any ne king's cuſtoms due for merchandize, ſhall forfeit treble alue of the merchandize; and by the ſtatute of 1. *Eliz. c.* 11. cuſtomer of any port may make a deputy for the cuſtoms of creek belonging to that port; and a deputy ſo appointed had :ealed the cuſtom, and the principal, ignorant of this fraud, ifies his account into the exchequer, without taking notice of fraud, or the cuſtom due for the concealment; and an action ight againſt the principal, and adjudged it lay; and what is the on thereof, but becauſe the principal ſhall anſwer for his ity? And where it is ſaid, that the deputies of the poſt-maſter he act have power to make deputies, and they are to have ants, who are to act under them, that makes no matter, for principal ſhall anſwer for all the neglects, not only of the ties he makes, but alſo of that deputy's deputy and ſervants, ſo down; for he ſhall be anſwerable for every act of them, ſhall tend to the prejudice of another in their deputation. that is not this caſe; for *Breeſe*, in this caſe, through whoſe ect this letter has been loſt, was immediately put in by the ndant himſelf; though if it were by his deputy or ſervant, it been the ſame.

ly *Brother* POWIS ſays, they are all fellow-ſervants; that is, poſt-maſter and letter-carrier, becauſe they all receive their ies from the king, though retained and put in by the defen- ; and compares them to a ſteward and ſervants of a noble- 's houſe. But I anſwer, that they are paid by the king as ties and ſervants of the defendant; and there is no diverſity in the manner of paying * them, for they are under the com- * [490] d of the defendant, and to act according as he directs; and it intended by the act, that he ſhould pay all his ſervants out of alary; and if he agree with the king to have ſo much clear imſelf, and that the king ſhall pay his ſervants, they are no leſs ervants becauſe the king pays them; and if they be not his unts, what becomes of the defendant, who is by the act to ge the office by him and his deputy, and ſervants? and if he ople manage it who are not his ſervants, and over whom he o power, and they imbezil goods or other things, ſurely the dant ſhall anſwer for it, for he does not manage the office as atute directs; and his letting people in that are mere ſtran- that ought not to be there at all, ſhall not excuſe him from t or other miſchance.

t now my Brother has found out a better employment for and compares him to a captain, and his deputies and ſervants ſoldiers of a company, and as the captain ſhall not anſwer e valour and courage of his ſoldiers, ſo neither ſhall he for re and diligence of his ſervants. I AM OF OPINION, that

ſea; though he ſhall not be anſwerable for a robbery

And it ſeems plain to me the act intended he ſhou
able for all the letters and packets they ſhould receiv
default of their ſervants. For firſt, it has given the
and government of the office to the maſter-general
care is delivered to him, ſo nobody is to intermeddl
ſuch as he ſhall intruſt; and if this act were ſaid t
office as a new office, notwithſtanding the action w
when an act erects a new office for the benefit of the
* [491] the ſame circumſtances with other offices, in which
has an intereſt, in reſpect whereof the perſon exe
would be liable to an action for the default of his ſe
be preſumed the act deſigned the new officer ſhould
why elſe ſhould they make it ſo like in reaſon? An
he is intruſted with the intereſt of the ſubject as
ſheriff, or other officer of juſtice is; and the act dire
ſhould be ſent with ſafe diſpatch; and who is to de
poſt-maſter?

Further it appears, that it was the deſign of the ſt
ſhould be anſwerable for the default of his deputy
conſider theſe two clauſes. FIRST, "That the pe
"his deputies, and no other, ſhould find horſes; a
"default of poſt-maſter, any perſon ſhall fail of g
"in all ſuch caſes the maſter ſhall forfeit five pound
the words, "and if through default of *the maſter*,
deputy; which ſhews they intended, that if any fau
ſhall be reckoned that of the maſter. For if one t
cannot be furniſhed with horſes, who ſhall forfeit th
for every default? The maſter, and not the deputy; a
the default of the deputy is the default of the maſter
pears plainly by this branch of the act.

ſe for the defendant; for if there be ſeveral inns on the road, yet if I go into one when I might go into another, and am ed, or otherwiſe loſe my goods there, the election I had of ; that, or any other inn, ſhall not excuſe the inn-keeper. So the plaintiff had election to ſend by the poſt or meſſenger; f he ſend by poſt, and that there is default in him, he ſhall his action. And he cannot ſend by the meſſenger with ſpeed, the poſt; and ſpeed was one of the benefits deſigned by the te to the ſubject; and it took away the advantage he had of ng by a ſpeedy meſſenger before, and ſo would put him in a : condition, which never was the intent of the act; and as to mallneſs of the *præmium*, there is nothing in that, for the law :s it a reaſonable reward; and if one do not like the conditions office, he may let it alone.

Then as to the clauſe in the patent, that the defendant ſhould * [492] ıe anſwerable for any neglect, but his own immediate neglect; ıſt be intended only in relation to the management of the ıue, for which they are to account to the lord treaſurer, or againſt law; for it is not a grant by letters patent, that ſhall ve the ſubject of the benefit given by the act; for the poſt- r is to act according to the ſtatute, and not according to the s patent. And where it is ſaid, that they ſhall from time to obſerve ſuch directions as are ſent to him under THE SIGN UAL; if any ill conſequence happen by ſuch an obſervation, are not excuſed; I ſay then, that this clauſe, that they ſhall nſwer for miſcarriage of ſervants, or any but their own, may this effect, to exempt them from any miſmanagement of the ue of the office; becauſe that being the king's, he may order s he pleaſes. But that clauſe in a patent ſhall never deprive bject of his benefit ordained for him by the ſtatute, though ·e with a *non obſtante*, when *non obſtante's* were in their ut- rigour.

for theſe five reaſons I hold the action lies:

RST, Becauſe it is a public office, intruſted to them by par- ıt, for the profit and benefit of the ſubject, which in its : requires care and diligence.

:ONDLY, Becauſe the defendant has a reward for his care at pence of the ſubject.

IIRDLY, The ſame reaſon holds to charge them in this caſe charge carriers, inn-keepers, and ſuch like, *videlicet*, the inconvenience which would otherwiſe enſue, by reaſon of ngerous temptation and opportunity they would lie under to il goods intruſted to them, without poſſibility of proving a :ular neglect.

URTHLY, They are within the meaning of 12. *Car.* 2. ; and if that were not ſo, in this caſe defendant would be by his acceptance.

LANE *againſt* SIR ROBERT COTTON.

FIFTHLY, They might ſend theſe things by other before the ſtatute, againſt whom an action would lie riage, which is taken from them by this act; which ſigned for their benefit, it muſt be intended in reaſo ſtatute leaves them a like remedy. Theſe are my rea do not ſee any to the contrary.

Caſe 797.

* The King *againſt* Stukely.

If a coroner in taking an inquiſition *ſuper viſum corporis*, exclude ſome of the jurors ſworn, in order to find the deceaſed *non compos*, the Court will grant an information againſt him, and order a new enquiry.

STUKELY was coroner of *Dorſetſhire*; and a perſon h ed himſelf, as there was reaſon to believe, felonioufl he had made a formal will juſt before; and this coro ſworn the jury to inquire, finding the evidence given v took off ſome of the inqueſt.

HOLT, *Chief Juſtice.* It is not in a Judge's power a juryman after he is ſworn: and though this coroner ſilly man, yet that is no reaſon why there ſhould not b FORMATION againſt him; for ſuch men muſt learn the thruſt themſelves into offices. The return of the inquiſ ing the deceaſed *non compos*, not being filed, it was quaſ Court. HOLT, *Chief Juſtice*, cited a caſe of one *Tomb* killed himſelf at *Highgate* in the year 1655, and the in ſet aſide for practice. And he ſaid, if there be a new i muſt be by thoſe that had the view of the corpſe.

S. C. Holt. 167. Holt. 496. Cro. Eliz. 371. 1. Mod. 82. Cartli 72. 1. Vent. 181 352. 3 Mod. 80. 100. 238. 1. Salk. 170. 3. Hawk. P. C 1. Stra. 69. 1. Hale, 415. 2. Hale, 59, 69. 1. Bac. Abr. 496.

Caſe 798.

Anonymous.

Bail may plead uſurious contract.

HOLT, *Chief Juſtice.* The bail to the action may uſurious contract, though he be not privy to it.

A ſpecial plea is no plea till paid for.

And a ſpecial plea is no plea till it be paid for; but if accept it without inſiſting upon that, it will be well (*a*).

1. Sellon's Pract. 327. 2. Strange, 1260.

(*a*) See Anonymous, poſt. 496.

Caſe 799.

How *againſt* Acton.

Rule for judgment.

PER CURIAM. If there be a rule for judgment in on it muſt be entered before *the eſſoin-day* of the next T elſe they muſt go over to the next Term by *continuance*, a it as of the ſecond Term.

1. Stra. 639. 6 Mod. 59. 191. Tidd's Pract. 695. 1. Sellon's Practice, 497, 498.

Caſe 800.

Anonymous.

If coſts taxed are not paid, attachment goes.

PER CURIAM. Upon coſts being taxed by *the maſter* an order of reference of an attorney's bill, if the coſts paid, an attachment ſhall go.

2. H. Bl. Rep. 248. Tidd's Pract. 676. 1. Sellon's Practice, 530.

Anon

Anonymous. Caſe 801.

:URIAM. If a witneſs, which is not likely may be had trial, be examined before a Judge, and croſs-examined by party, and his depoſitions put in writing; yet if at the proved, that the party might have him there, his depo- not to be read (*a*).

Depoſitions taken *in perpetuam rei memoriam* ſhall not be read if the deponent can be *ſubpœnaed.*

: Benſon *v.* Olive, 2. Stra 286. Baker *v.* Fairfax, 1. Stra. Bull. N. P. 239. b. 248. Tilley's Caſe, Salk. 101.

* Anonymous. Caſe 802.

N MOTION to eſtreat a recognizance, the other ſide ought ave notice.

Recognizance.

The King *againſt* Eller. Caſe 803.

', *Chief Juſtice.* If an innocent perſon receive money a forged note, not knowing anything of the forgery, it ne in him; but he ſhall anſwer for the money ſolely (*a*).

Money paid on a *forged authority* may be recovered back.

ceiving money upon a forged note, knowing the forgery, cation of the forgery.

Publication of forgery.

Jacob *v.* Allen, 1. Salk. 27. Robſon *v.* Eaton, 1. Term Rep. 59.
derwood, 2. Ld. Ray. 1210. Allen *v.* Dundaſs, 3. Term Rep. 125.
v. Hind, 4. Burr. 1986. Cheap *v.* Allen, 3. Term Rep. 127.

Anonymous. Caſe 804.

', *Chief Juſtice.* If writ of error pending, the plaintiff and execution be taken out without acquainting the erewith, it will be ſet aſide for irregularity; *ſecus* if the appriſed of it.

Execution pending error, muſt be by leave of the Court.

Tidd's Pract. 719, 721. 1. Stra. 301. 2, Stra. 1241. Sellon's Pract. 544.

Weſt *againſt* Chamberlain. Caſe 805.

ATE concerning evidence to be given about the corpo- of *Tiverton*,

Where original is evidence, copy is.

URIAM. Wherever an original is evidence, a copy of nal will be evidence too (*a*).

ccordingly Gilbert's Law of 593. *notis.* Birt *v.* Barlowe, Dougl. 171.
l edit. 48. Lynch *v.* Clerke, Tillard *v.* Shebbear, 2. Wilſ. 366.
. Rex *v.* Gordon, Dougl.

Leave to inſpect corporation books.

AND IT WAS ALSO DIRECTED, that the adverſe party in this caſe ſhould have ſight of the corporation books, and leave to take copies; but not that the books themſelves be produced (*a*).

(*a*) Under what circumſtances the Court will grant inſpection of books, ſee Mr. Nolan's note to the caſe of Rex *v.* The Hoſtmen of Newcaſtle, 2. Stra. 1223. where all the caſes upon this ſubject are collected and arranged under their reſpective diſtinctions.

Caſe 806. Anonymous.

Action againſt a ſheriff.

HOLT, *Chief Juſtice*. An action will lie againſt a ſheriff for not returning *good iſſues* upon a *diſtringas*.

See Raban *v.* Plaiſtow, 3. Burr. 2726. and 10. *Geo.* 3. c. 50.

Caſe 807. Holm *againſt* Hunter.

Goods taken on a *levari* cannot be delivered in execution.

Gilb. Ex. 28.

IN TRESPASS for taking goods, the defendant juſtified by a judgment in a court-baron, and that the goods were taken by a *levari*, and delivered to him, being plaintiff, in execution. To this there was a demurrer.

Judgment was given for the plaintiff; for that goods ſo taken cannot be delivered in execution, but perhaps they might ſell them, and ſo raiſe the money, or have appraiſed them.

Proceſs of a court-baron.

Another doubt was, whether a *diſtringas*, and not a *levari*, was not the proper proceſs.

Qu. If a court-baron can hold pleas.

THIRDLY, Whether a manor, *quatenus* a manor, has a court-baron to hold pleas; it is * true it has *eo nomine* a court-baron to have ſuit, but it was doubted whether to hold plea without preſcription.

* [495]

Caſe 808. Homes *againſt* Barneham.

A bond for *quadraginta liberis* is good.

2. Roll. Abr. 147. Hob. 119. Cro. Jac. 146. 338. 10. Co. 133. Cro. Eliz. 896. Yelv. 225. Jones, 366. Salk. 462. 2. Lev. 166. 5. Com Dig. "Obligation" (B. 3.). Shepherd's Touchſtone, ch. 22. p 369, 370. and 4. *Geo.* 2. c. 26.

DEBT UPON A BOND conditioned for the payment of twenty pounds. Upon *oyer* it appeared to be "*firmiter obligari in* "*quadraginta liberis*," yet the plaintiff had judgment.

Caſe 809. Toſen *againſt* Skipper.

Suit in the ſpiritual court, for calling a woman *whore* in *London*, prohibited.

Cro. Car. 110. 2. Roll. Abr. 297. 1. Sid. 404. 1. Mod. 21. 1. Vent. 7. 61. 220. 2. Lev. 63. Bunb. 260. 312. 1. Stra. 555. 2. Stra. 823. Fort. 347. 4. Burr. 2033. Cowp. 422. 2. Term Rep. 473. 6. Com. Dig. "Prohibition" (G. 14.).

LIBEL in the ſpiritual court for calling a woman "*a whore*;" and a prohibition was moved for upon a ſuggeſtion of the cuſtom of *London* to puniſh whores, and that the words were ſpoke in *London*; and it was granted. And it was ſaid, that the way of proceeding againſt whores in *London*, is by information in the mayor's court (*a*).

(*a*) But ſee the caſe of Argyle *v.* Hunt, 1. Stra. 187, 188. S. C. Fort. 347. S. C. cited 3. Atk. 52. Blaquiere *v.* Hawkins, Dougl. 364.

Palmer

Palmer *againſt* Staveley. Caſe 810.

3ITATUS ASSUMPSIT. There were two counts; and verdict and general damages, it appeared that one of them noney received to the defendant's own uſe; and though it o be a ſlip of the clerk, yet the Court held it fatal. *Vide Mod.* 92. 1. *Sid.* 306. 2. *Keb.* 615. *(a)*.

Aſſumpſit for money had to the uſe of *the defendant* good after verdict.

S. C. poſt. 510.

S. C. Salk. 24. S. C. Comy. 115. 4. Bac. Abr. 96.

e S. C. poſt. 510. *contra.* and Noſworthy *v.* Wyldeman, 1. Mod. 42.

Anonymous. Caſe 811.

iformation was filed againſt the defendant who ſet up a ery, and afterwards ran away without drawing it (*a*).

Information. Poſt. 511.

te now reſpecting private lot- k 11. *Will* 3. c 17.; 9. *Ann.* c. 26.; 8. *Geo.* 1. c. 2.; c. 19; 6. *Geo.* 2. c. 35.; c. 28.; 13. *Geo.* 2. c. 19.; 18. *Geo.* 2. c. 34.; 22. *Geo.* 3. c. 47.; 27. *Geo.* 3. c. 1. and the deciſions thereon collected 2. Hawk. P. C. 7th edit. ch. 92. page 493 to 523.

Anonymous. Caſe 812.

', *Chief Juſtice.* Upon a conviction of forcible entry, uſtices ought to commit the offender. If they find force, upon the view to remove it, and commit the offender, o award reſtitution without inquiſition; and this they hough the entry be peaceable, if the detainer be with which caſe they may convict the offender upon the view.

Juſtices on view of forcible entry may commit, but not award reſtitution.

1. Sid. 156.

1. Keb. 88. 1. Vent. 308. 2. Hawk. P. C. 7th edit. ch. 64. ſ. 49.

* Atfield *againſt* Parker. Caſe 813.

ACTION againſt an executor or adminiſtrator, if he plead judgments, he confeſſes aſſets for above nineteen of d yet they muſt at their peril plead all the judgments in inſt them; for if they fail in one of them, they ſhall never advantage of it, for the creditor ſhall have judgment to hen aſſets come. And if the executor plead not all his s, he loſes the right of preferring them, and may be a *devaſtavit* for thoſe judgments he has omitted to f which ſee a caſe well reported in *Hutton*, for the of the judgment is a protection of the aſſets which you nay have, until the judgment be ſatisfied. And if one judgments, and one of them be falſe or fraudulent, you l with the whole debt. *Per* HOLT, *Chief Juſtice*, and *Juſtice.*

Executor muſt plead all the judgments in force againſt him.

S. C. Holt, 310. Ante, 153, 154, 411.

The King *againſt* Atkinſon. Caſe 814.

JRIAM. There cannot be a *melius inquirendum* where quiſition was *virtute officii.*

Melius inquirendum cannot be where the inquiſition is *virtute officii.*—Ante, 493.

Filing the inquiſition ſtayed till indictment tried.

An indictment was againſt the coroner for practice to find *felo de ſe non compos*, and iſſue joined upon the fact; and the inquiſition being brought hither, THE COURT ſtayed the filing thereof till the iſſue upon the indictment was tried.

And PER CURIAM, It is a crime in one to take upon himſelf an office he does not underſtand.

Caſe 815.

Anonymous.

Plea not paid for is a nullity. Ante. 493. Sillon's Pract. 389.

HOLT, *Chief Juſtice*. When the defendant's attorney brings a plea to the plaintiff's attorney, and does not pay, the other may proceed as if no plea was tendered.

But now no judgment ſhall be ſigned for non-payment of iſſue money, but it ſhall remain to be taxed as part of the coſts in the cauſe. Rule C. B. Hil. 35. Geo. 3. 2. H. Bl. Rep. 384. Same Rule B. R. Hil. 35. Geo. 3. 6. Term Rep. 218.

Caſe 816.

Selby *againſt* Bank.

A cuſtom not to pay tithe for HAY when employed to fodder titheable cattle is void.—So alſo is a cuſtom not to pay tithe of LAMBS not yeaned in a particular place, in conſideration of paying the tenth lamb yeaned there, where ewes fed there for any time throughout the year.

BROTHERICK moved for a prohibition to the ſpiritual court, the libel being for tithe hay and lamb, upon ſuggeſtion, as to the hay, that it was cut in a certain waſte within ſuch a manor; in which manor there was a cuſtom, that anything employed for foddering of things titheable ſhould pay no tithe, and avers that the hay for which, &c. * was employed in foddering of ſheep. As to the tithe lamb, it was ſuggeſted that there was a cuſtom, that for all the lambs that were yeaned there, for what time ſoever the ewes were fed there, the tenth lamb ſhould be paid for tithes; in conſideration whereof they were tithe-free for lambs of ewes that fed, but did not yean there. And he relied on 1. *Rell. Abr.* 648. where ſuch a cuſtom as to the ſecond point was held good, becauſe, as he ſaid, it was more than was due for tithes of lamb of common right; for he ſaid the tenth lamb of common right did not belong to the parſon in whoſe pariſh they fall; but regard will be had to the place where the ewes are fed, and the eccleſiaſtical court will make equal diſtribution between the pariſhes where they were fed, and where they yeaned, which is excluded by this *modus*.

*[497]

CHESHIRE *contra*. The ſuggeſtion is a plain *non decimando* to pretend to pay no tithe hay, becauſe he feeds his ſheep with it; and cited 1. *Rell. Abr.* 650. 2. *Cro.* 47. *Moor*, 683. *Warner's Caſe*. And as to the lambs, it is very unreaſonable, for thus by removing the ewes into another pariſh when they begin to yean, the parſon is ouſted of his tithes, though they fed all the year before in his pariſh; or ſuppoſe nine fall, he ſhall have nothing.

Hay is a predial tithe; ſo corn.

HOLT, *Chief Juſtice*. Of common right tithe lamb is payable where they fall, but by canon law there is a regard to be had to the place where they were engendered and bred. And your cuſtom for hay is void, for hay is a predial tithe; and though you feed your cattle with it, yet you ought to pay tithe. Of wood

ſpent

SELBY *againſt* BANK.

in an ancient meſſuage for huſbandry, one may preſcribe a *cimando*, for that formerly tithe was not paid for wood; but annot lay ſuch a cuſtom for corn, for corn is a predial tithe, ithe wood is ſettled by act of parliament, to be paid only : it was uſually paid: So that if there was a cuſtom before, atute does not take it away; and beſides, you have not ſaid he hay was fodder to cattle employed in huſbandry, but only at the tithe will be the better for it. And by the common aſturage is as much tithable as hay, but the difference is paſ- : being taken by the mouth of cattle, but the hay is tithable : it is ſevered from the ground; paſturage ſhall pay no tithe, e cattle that feed it ſhall; but cattle of pail and plow ſhall pay he if you feed them upon paſture all the year long; and the of that is, for that becauſe they are as tools of huſbandry, ich tithes are * meliorated. And no tithe is originally due r in that caſe, but tithe is originally due upon mowing of aſs; and your ſubſequent application of it, though to cattle l and plow, ſhall not diſcharge you of a charge to which you liable before upon the mowing. And the graſs is tithable n reſpect of the feeding, that is, the uſe and application it tithable; and for that you cannot have any other tithe om the profit of the cattle that do feed it. And as to the point of the lambs, one tithe in ſpecie cannot be a diſcharge ther tithe in kind; and though, as I ſaid before, tithe lamb is paid where they fall, yet by the received canon law there is to the place of feeding; and *Marſh*, 79. 1. *Mod.* 239. cited.

By common law paſture is as much tithable as hay.

*[498]

Tithe hay is due on the mowing it.

d after conſideration THE COURT declared at another day, o prohibition ſhould go in either part; for as to the lambs, dangerous cuſtom, becauſe eaſily converted into fraud, by the ſheep away in yeaning time. And the other point is upon the caſe put out of *Cro. Jac. &c* and after-math of ion right is tithable, and no prohibition. PER TOTAM AM.

TE, *per* HOLT, *Chief Juſtice, hic.* One is not bound to the lamb if he has any number under ten, becauſe they are things; but if he has nine pounds of wool, he ſhall pay tithe *viz.* by an inferior weight, as by ounces, for that is divi-

The King *againſt* Dillon.

Caſe 817.

original order of ſeſſion was made upon him for diſcharging his apprentice from him, purſuant to the ſtatute of 5. *Eliz.* 35. and ordering him to refund ſome of the money he had ed with him.

Seſſions may diſcharge an apprentice, and order money received to be refunded.

S. C. Salk. 67. S. C. Holt, 68.

FIRST, It was objected, they had no power by the ſtatute refunding of money, but only to diſcharge the apprentice-

ſhip;

ANSWER. The words are indeed, "that they i
"on appearance;" but it were hard to conſtrue i
* not meddle if he will not appear, for then he wo
tage of his own wrong; but it ought to appear th
moned or warned to appear (*b*).

Seſſions may make an original order to diſcharge an apprentice.

THIRD EXCEPTION was, That it appeared thi
begun at the ſeſſions, whereas they have no juriſ
application to the principal magiſtrate of the corp
juſtice of peace.

Vide 1. Vent. 175.

And of this opinion was HOLT, *Chief Juſtice*;
ſideration, becauſe the precedents went the other
way to them; and the order was confirmed (*c*).

(*a*) See accordingly Rex v. Johnſton, poſt. 553. S. C 1. Salk. 67. Hawkſworth v Hilary, Saund. 315. 1. Mod 2 Rex v Annes, Conſt's Poor Laws, 515. pl. 731. Ditton's Caſe, 2 Salk. 490.

(*b*) Rex v. Gill, 1. Stra. 143.

(*c*) It is a point n puted, but that the ſ ginal juriſdiction to d Rex v. Davie, 2. S Gill, 1. Stra. 143. P. L. 513.

Caſe 818. The King *againſt* Orbevill.

Indictment for a cheat not quaſhed on motion.

ORBEVILL was indicted for fraudulently, unla
wicked gain to himſelf, procuring another to l
ſuch a match (*a*); and though it had many apparent
being a cheat, THE COURT would not quaſh it up

S. C. 6. Mod. 42.
2. Show. 341.
6. Mod. 61. 105. 301. 2. Hawk. P. C. ch. 61.

(*a*) See Rex v. Young, 3. Term Rep. 98. (*b*) See 4. Com. Dig.

Caſe 819. Anonymous.

The King *againſt* Raw. Caſe 820.

ertinent interrogatories be put to a perſon who is ordered ſwer interrogatories, his way is to demur to them; for no way but *to anſwer*, or *to demur*. And there ought not interrogatory leading the party to a penalty.

Non-pertinent interrogatories are demurrable.

Anonymous. Caſe 821.

ER moved for an attachment againſt an officer for exe- ng, by diſtreſs, an order of juſtices for levying of money ir of a bridge, after the order was removed by *certiorari*.

Certiorari muſt be delivered before any contempt.

r, *Chief Juſtice*. There never is any formal allowance of *ari* below; but to bring one into contempt, the diſtreſs after the *certiorari* preſented below; and if a warrant livered before that time, the way had been, upon producing *orari*, to get *a ſuperſedeas* of it, and deliver it to the officer, ıe cannot be in contempt.

Yelv. 32. March, 27. 112. Dyer, 245. 1. Salk. 148, 149. 2. Salk. 564.

* [500]

* Dillon *againſt* Crawly. Caſe 822.

)R of a judgment upon a demurrer to evidence in the nmon pleas, the witneſs to the ſealing and delivery of a ing *ſubpœnaed*, did not appear. But to prove it the party's ıey proved an indorſement made by him thereupon three ter; reciting a proviſo within, that if he paid ſuch a ſum l ſhould be void, and acknowledging that the ſaid ſum was l; and a fine was levied of the very lands mentioned in the *Crawly*, and by the indorſement he expreſsly owned it to eed; and upon this the deed was read.

An indorſement by the party to a deed, reciting one of the proviſoes in it, and expreſsly owning it to be his deed, is good evidence, on the abſence of the ſubſcribing witneſſes, that it is his deed.

now it was objected, that this was not good evidence, be- ɔt the beſt the nature of the thing could bear, but only cir- ıtial; which never ought to be admitted, where better may *ex naturâ rei*, becauſe circumſtances are fallible and doubt- d it is upon this reaſon that a copy of a record is good, be- ne cannot have the record itſelf; but a copy of a copy will Upon *non eſt factum* to a bond, one of the witneſſes being *ed* did not appear; and it was offered to prove that he t his bond, but denied.

S. C. Holt, 299.

r, *Chief Juſtice*. Can there be better evidence of a deed own it, and recite it under his hand and ſeal?

ER TOTAM CURIAM, Judgment was affirmed.

How

Caſe 823.

How *againſt* Acton.

Writ of enquiry. See Payton v. Burdus, Stra. 1100.

HOLT, *Chief Juſtice.* If plaintiff delay the executing a *writ of enquiry*, till a year after the *interlocutory judgment*, he cannot do it afterwards without a *ſcire facias*.

Caſe 824.

Reek *againſt* Thomas.

Adminiſtration *durante minoritate* of executor, determines at ſeventeen, of adminiſtrator at twenty one. Ante, 438.

DEBT UPON A BOND by adminiſtrator *durante minoritate* of one intitled to be adminiſtrator as reſiduary legatee; averring that the ſaid perſon was under twenty-one years; the defendant demurs, becauſe, as appeared by his averment, his adminiſtration was determined, or at leaſt might be ſo; for if the legatee were of ſeventeen years of age, though under twenty-one, as it was pretended, the adminiſtration of the plaintiff would ceaſe; like to adminiſtration *durante minoritate* of an executor.

* [501]

5. Co. 29.
1. Sid. 185.
1. Leon. 74
2. And 34
2. Mod 174.
Cro. Eliz 43.
Skin. 155.
3. Peer Wms. 79.
3. Com. Dig. "Adminiſtration" (F.).
5. Com. Dig. "Pleader" (2 D. 11).

* BUT IT WAS RESOLVED, that there is a great difference as to this point, between adminiſtrator during the minority of one intitled to be adminiſtrator as reſiduary legatee, or other perſon, and when it is during the minority of an executor; for in the laſt caſe the adminiſtration determines immediately upon the executor's arriving at ſeventeen, and the infant is *ipſo facto* executor before to all purpoſes, but to bring action. But in the other caſes the adminiſtration does not determine till the legatee or other perſon's age of twenty-one; and there muſt be an act done before the legatee is intitled to adminiſter; and this is the practice in the ſpiritual court; *vide Atkinſon v. Corniſh (a)*, and *Dubois v. Dubois (b)*.

So NOTE the diverſity; for when it is granted during minority of ſuch a one executor, that is during his minority *quatenus* executor, which is till ſeventeen; but when it is during minority of *J. S* or reſiduary legatee, that is till the legal age of twenty-one. And there is an intereſt veſted in the adminiſtrator by act of parliament upon the grant of the ordinary; ſo that if it be during the minority of one appointed executor, his time to adminiſter is till ſeventeen, and when that comes his authority ceaſes: But in the other caſe the ſenſe of the word "minority" is left to conſtruction upon the act of parliament, and that muſt be according to common law of legal age.

Ante, 438.

Judgment was given for the plaintiff.

(*a*) 3. Danv. 356. p. 9. 5. Mod. 395. Comb. 475. Carth. 446. Ante, 294. Holt, 43. 1. Ld. Ray. 338.

(*b*) Dubois v. Trant, ante, 436

Anonymous.

Anonymous.

Caſe 825.

CURIAM. It has been held once, that if the plaintiff been non-proſſed in a former action, that if he began e ſhould have but common bail; but this has not been ay, but a *non prof.* in a former ſuit is evidence of a vex- roſecution.

Spurawaÿ *againſt* Rogers.

Caſe 826.

Whether ſuing out a writ of error, or the notice of it, be the *ſuperſedeas.*

1. Ven. 30. Salk. 321. 6. Mod. 130.

PIAS was returnable the firſt day of *Hilary Term*, and the ternoon of that day a writ of error was brought returnable *ſcacc.* the next day.

T, *Chief Juſtice.* It has been a *vexata quæſtio*, whether ag out the writ, or the notice thereof to the plaintiff or his y, were what ſuperſeded the execution; if the writ be *teſted* turn of the *capias*, it does not ſuperſede it. If a *capias* be d execution thereon, and then writ of error, it ſhall not ge the execution. And the antient opinions have been, writ of error is a *ſuperſedeas* from the * actual purchaſing of it, but that the party ſhall not be puniſhed for executing it ice, but that ſtill it avoided the execution. And if a *capias* en out and executed within four days after return of THE A, it is ill; *ſecus* if taken out within the four days, and ex- after; and if there be not four days in Term after return E POSTEA, they muſt be made up in Vacation before ex- n executed.

* [502]

T NOTE, *Clark*, the ſecondary, told me, that a writ of error t a *ſuperſedeas* till a certificate taken out from the clerk of rors and ſerved on the party. *Parker v. Woolaſton*, *l.* 130. (*a*).

C. Salk. 321. S. C. 2. Ld. 6. 1260. See Sweetapple *v.* w, 2. Stra. 857. Smith *v.* , 2. Stra. 1186. S. C. 1. Wilſ. ry *v.* Campbell, 3. Term Rep. 390. Dudley *v.* Stokes, 2. Black. Rep. 1183. Lane *v.* Bacchus, 2. Term Rep. 44. Capron *v.* Archer, 1. Burr. 340. Jaques *v.* Nixon, 1. Term Rep. 279.

Anonymous.

Caſe 827.

An indictment for *a riot* concluding *contra formam ſtat.* is good.

1. Salk. 370. Comp. 30. 2. Hale, 190. 4. Hawk. P. C. 115, 116, 117. and Rex *v.* Mathews, Hilary Term, 33. *Geo.* 3. where it is decided, n indictment for an offence at common law a concluſion of *contra formam ſtatuti* may be ſurpluſage. 5. Term Rep. 168.

INDICTMENT for a riot concluded "*contra formam ſtat.*"

EXCEPTION was, That a riot was a common-law offence, ble independently of any ſtatute; and therefore the conclu- is ill.

T, *Chief Juſtice.* Though it be not made an offence by tute, yet divers ſtatutes there are directive of the manner

of

ANONYMOUS. of puniſhing of it, and that is reaſon enough to make th
ſion good. As upon the ſtatute of Stabbing, the thing
before, but clergy is ouſted by the ſtatute; and yet an i
for that ſort of felony does conclude *contra formam ſtat.*; t
ſtatute does not make the offence, for it was felony befor
other hand, an indictment would be well without concl
the ſtatute in that caſe; ſo both ways are good (*a*). S
of barretry, you may conclude an indictment "*contr*
"*ſtatuti*," or "*diverſorum ſtat.*" or take no notice of a
at all; for wherever there was an offence at common la
ſtatute makes a further proviſion of penalty, an indict
that offence may conclude "*contra formam ſtat.*" or lea
at election.

Caption of an indictment good.

ANOTHER EXCEPTION was, That it was not ſaid in
tion, that the jury were "*jurat. et onerat. ad tunc et ib*

1. Keb. 101. 524. 629. 852. 2. Keb. 367. 2. Jones, 180. See 4. Hawk. P. C. ch. 25. ſ. 17. and the omiſſion of the word *onerat.* is not fatal, if there be the word *jurat.* for that fully i

But no heed was taken to it.

An indictment for a riot not quaſhable on motion. Ante, p. 99.

And HOLT, *Chief Juſtice*, further ſaid, that it was
to quaſh indictments for a nuſance, riot, or any other p
fence, on motion; but in caſe of petit riots, upon a
right of common, it had been often done.

(*a*) See Anonymous, ante, 446.

*[503]

Caſe 828.

* Atkinſon *againſt* Morrice.

Condition precedent.

ACTION ON THE CASE for ſo much money promiſ
uſe of a coach and horſes for a year.

S. C. Holt, 148. Ante, 455.

Upon the evidence before HOLT, *Chief Juſtice*, at
Morrice agreed to give *Atkinſon* ſo much for the uſe of a
horſes for a year; and *Atkinſon* agreed further with *M*
keep the coach in repair; it was averred, the coach a
were delivered to *Morrice*, but nothing of the repair.

And HOLT, *Chief Juſtice*, held, upon this evidence,
pairing was not a *condition precedent*, and therefore nec
averred; but if the agreement had been, that *Atkinſon* h
to give *Morrice* a coach and horſes for a year, and to r
coach, and that for that *Morrice* promiſed ſo much mon
the repairing had been a condition precedent, neceſſa
averred. And though in this caſe it was not expreſsly
that *Morrice* had the uſe of the coach for a year; yet it b
it was delivered to him, it ſhall be ſo intended, if contra
ſhewn of the defendant's ſide.

And judgment for the plaintiff above.

Anon

Anonymous. Caſe 829.

ER CURIAM. Where a whole county is concerned in a trial, as in an information for not repairing a highway, or a mmon bridge, the trial ſhall be by a jury of a neighbouring unty; and a ſuggeſtion muſt be made upon the roll of the cauſe its being tried in another county, *viz.* that it concerns the ole county (*a*).

Where a whole county is concerned in a trial, it ſhall be by a jury of a neighbouring county.

1. Vent. 61. 6. Mod. 191.

(*a*) Mayor of Poole *v.* Bennett, 3. Burr. 1564. Rex *v.* Amery, 1. Term itra. 874. Mayor of Briſtol *v.* Proc- Rep. 363. , 1. Wilſ. 298. Myloch *v.* Saladine,

Vezey *againſt* Smith. Caſe 830.

NDEBITATUS for goods ſold and delivered, againſt *a woman*, who pleads in abatement "coverture" at that time. he plaintiff replies, that ſhe was ſole, and not covert, and conides to the country.

A plea of coverture, if in abatement, needs no *venue*; if in bar, muſt be laid at a certain place.

It was objected, that the replication was ill; for that it ſhould ve been taken with an ABSQUE HOC, that ſhe was covert, and t as here, and not covert. And the caſe of *Nichols v. Baw (a)*, d 1. *Saund.* 21. was quoted; in debt upon a bond the defendant eaded, that the plaintiff was an alien enemy; replication, that he as born in *England*, and not an alien, without laying any place r *venue* but as here; but they could not tell the judgment of at caſe.

* HOLT, *Chief Juſtice.* If ſuch plea be to a writ, it need no *nue*, but may be tried where the writ is brought; but if it be leaded in bar, there muſt be a replication, and that muſt ſet forth e place of the party's birth in *England*, from whence a *venue* ay be; and though precedents be both ways, yet this is a true ifference, and according to *Co.* . and HE ſaid, the defendant uſt ſhew and prove the *coverture*; and ſaying in the replication at ſhe was ſole, implies the negative of a marriage, as much as at ſhe was not covert; and it is the ſame as pleading of infancy. this had been a bar, the marriage muſt have been laid at a cerin time and place; but being in abatement, it is well generally; it even there the huſband's name ought to be ſhewed, that the aintiff may know whom to have his writ againſt.

* [504]

Vide the firſt caſe in the next Term.

(*a*) 6. *Will.* 3.

Anonymous. Caſe 831.

ER CURIAM. Though a declaration be delivered as of a Term before, yet, if the rules of pleading be not out, one y plead in abatement the ſubſequent Term.

If rules for pleading be not out, may plead in abatement.

Anonymous.

Caſe 832. Anonymous.

Maſter and ſervant.

HOLT, *Chief Juſtice.* A lieutenant of a man of war give moderate correction to a ſeaman, but not wound for that is not moderate correction.

See the caſe of Swinton v. Molloy, 1. Term Rep. 537.

Caſe 833. Anonymous.

Indictment.

INDICTMENT, concluding *ad nocumentum* of inhabita a certain vill, was quaſhed for the ſpecial concluſion.

2. Roll. Abr. 83. 6. Mod. 453. Cro. Eliz. 90. 1. Vent. 26. 1. Mod. 107. 1. Saund. 135. 1. Ve 2. Hawk. P. C. 7th edit. ch. 75. ſ. 3. Sayer, 167. 301.

Caſe 834. Anonymous.

Chapel, what.

PER CURIAM. A chapel's having ſacramentals only, t it not independent of the pariſh, but it muſt have all badges, as ſepultures, &c.

1. Burn's E. L. 273. Degge's Parſon's Lawyer, 1. c. 12. Ken. Par. Ant 590, 591. 2. Roll. Abr. 290. 1. Salk. 16

EASTER TERM,

The Thirteenth of William the Third,

IN

The Common Pleas.

Sir Thomas Trevor, *Knt. Chief Juſtice.*

Sir Edward Nevill, *Knt.*
Sir John Powell, *Knt.*
Sir John Blencowe, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Solicitor General.*

Anonymous.

Caſe 835.

General bond for reſignation of a benefice, good. Cro. Car. 180. 1. Jones, 220. Hutt. 111. 1. Vern. 411. Prec. Chan 513. 2. Chan. Rep. 398.

HE caſe was debt upon a bond for a great ſum of money; the defendant pleaded, that the condition was for a parſon's ning his benefice; and demurrer.

OWELL, *Juſtice.* I am of opinion, that when firſt the Judges theſe bonds good, if they had foreſeen the miſchief of them, would have been of another opinion; but now that opinion prevailed, and it is ſupported only by the poſſibility that it be to an honeſt intent*; as that the patron may have a ſon of wn capable of the benefice, or that he ſhould voluntarily re- in caſe of non-reſidence, which may rather argue care in the on than any corruption of ſimony; but if theſe were the real ives, why ſhould they not be ſpecially expreſſed in the con- n? But ſuch a bond as this is to reſign generally; it may he parſon could not have the benefice without it, he is thereby pted to ſtrain a point rather than be without a living, and the mon uſe of them is to have the money; and ſurely if the thing imony, a bond for it will be void. And my *Lord Coke's* no- is not law, where he ſays, that ſince the bonds are good, e ſhall be no averment of ſimony upon it. The ſtatute 31. c. 6. makes the church void, and gives the preſentation to the king;

* [505]

ANONYMOUS. king; and ſimony was againſt law before, and ſimoniacal agreements were void before that ſtatute, though ſimony itſelf was only puniſhed in the ſpiritual court. And he ſaid the caſe of *Gregory v. Oldbury (a)* was not law, where an averment of its being a ſimoniacal contract, and the patron and incumbent are privies to it; and if there be any ſimoniacal conſideration, they both muſt know it. And he quoted a caſe, where in an action upon ſuch a bond the defendant brought the plaintiff by bill into chancery; and becauſe he could not give a good account of the cauſe of taking ſuch a bond, a perpetual injunction was granted. But here we cannot ſet aſide this bond without a ſpecial caſe ſhewed in pleading, which is not done.

BLENCOWE, *Juſtice.* You aſſign no ſimony, but put it upon the plaintiff to ſhew none, which he need not do, becauſe we cannot intend it to be ſuch, ſince it may be otherwiſe; and here is a particular circumſtance why it ſhould not be thought ſimony here, becauſe it is in a ſum much above the value of the benefice; if indeed it had been for a ſum of leſs value, it might be intended perhaps the parſon would rather pay it than reſign. And he remembered *Juſtice* TWISDEN ſaid he had known ſuch a bond held good twelve times; ſo it would be hard to oppoſe it now, there appearing no ſimony in the condition, the defendant not averring any.

And, POWELL and BLENCOWE, *Juſtices*, being only in court, judgment was given for the plaintiff *(b)*.

(a) Moor, 641.

(b) See accordingly Jones v. Laurence, Cro. Jac. 248. 274. Babington v. Wood, Cro. Car. 180. Watſon v. Baker, Raym. 275. Graham v. Graham, 1. Vin. 131. Grey v. Heſketh. Amb. 260. Peel's Caſe, 1. Stra. 227. However, in the caſe of the Biſhop of London v. Fytche, Cunningham's Law of Simony, 52. it was determined by the Houſe of Lords, contrary to the opinion of the Courts of King's Bench and Common Pleas, that a general bond of reſignation is ſimoniacal and illegal: but a bond given by an incumbent to the patron on preſentation to reſide on the living, or to reſign if he did not return to it after notice, and alſo not to commit waſte, &c. on the parſonage houſe, is good. Bagſhaw v. Ibbley. 4. Term. Rep. 78. So alſo judgment was given for the plaintiff in debt on a bond of reſignation, with condition to reſide, to reſign for the patron's ſon to be preſented, and to keep the premiſes on the living in repair. Partridge v. Whiſton, 4. Term. Rep. 359. See alſo on this ſubject Mr. Chriſtian's Obſervations, 2. Black Comm. page 280, note (8.) 4. Black. Comm. p. 62. note 8. and the Frafier's edition of Burn's Eccl. Law, 3 fol. page

* [506]

Caſe 836.

* Walker *againſt* Humphry.

A *ſieri facias* iſſued in *Hilary* returnable *tres Mich.* is bad.

FIERI facias was taken out in *Hilary Term*, returnable *tres Mich.* and the Court, being acquainted with it, ordered they ſhould ſhew cauſe why it ſhould not be ſuperſeded; for this would take away all renewal of proceſs.

And

PER CURIAM, *Capias* of proceſs muſt have continuances, that, muſt be from Term to Term; but writs of execution ne, and for that may have a longer return.

Proceſs muſt have continuances, but writs of execution need none.

Pell *againſt* Garlick.

Caſe 837.

ſpaſs for breaking the plaintiff's cloſe, and keeping and ounding his horſes, and for breaking a cloſe called "*Old nd*" in ſuch a vill; the defendant pleads to iſſue as to the *mis*, and as to the taking of the horſes, that he was *poſ-* f a certain cloſe called *A.* and found the horſes there *feaſant*, and for that took and impounded them; and *& reſiduum tranſgreſſionis*," that there were many cloſes in called "*Old York cloſe*, but none without a further addi- That the *locus in quo* was called "*Valden Old-York*," and : defendant was ſeiſed thereof in his demeſne as of fee. ch there was a demurrer.

In treſpaſs, juſtification, without ſhewing the commencement of his eſtate, or that freehold was in him.

S. C. 2. Lutw. 1489. S. C. New Lut. 478. 2. Vent. 292. Cro. Jac. 43. 123. 4. Mod. 419. 423, 424. 2. Lev. 148. 3. Lev. 133. 3. Mod. 49. 132. 1. Salk. 360. 2. Mod. 70. 2. Salk. 643. 3. Term. Rep. 265.

THEW *for the plaintiff* maintained the demurrer, for that endant juſtifies by his poſſeſſion, without ſhewing the ncement of his eſtate, or that the freehold was in him: s a rule, that any man who makes a title to himſelf by ular eſtate, or would juſtify under it, ought to ſhew the ncement of it, that the party may thereby have an oppor- traverſe it. *Co. Lit.* 303. *b. Mar.* 1. *Cro. Eliz.* 171. *Cro.* 8, 139. But it is inſiſted on, that this is an exception of the le, and that the plaintiff could not take iſſue upon the ncement of the title here, if it had been ſet forth; but that he quoted the caſe of *Saunders v. Huſſey (a)*, and of *Silly v. Dally (b)*, both in avowry, which he ſaid ich ſtronger than this, an avowry being in nature of a ion.

THER EXCEPTION was, That the defendant juſtifies in cloſe than where we lay the treſpaſs, and laying the free- himſelf, he might have pleaded "not guilty;" and as e pleaded, they leave nothing for us to reply, without de- * [507]

WICH *contra.* The juſtifying by a *poſſeſſionat. fuit*, with- e, is well in this caſe, though I agree it would not be ſo vowry, becauſe that comprehends a title in itſelf, but this eſpaſs for goods taken in *D.* which muſt be intended and he took this diverſity; if the plaintiff had declared *auſum ipſius quer' fregit*, this plea had not been good, be- e declaration lays the poſſeſſion in the plaintiff: but here

the Court of Common Pleas, 'erm, 8. *Will.* 3. Roll. 336. 231. New Lutw. 390. Carth. 9. the Court of King's Bench, 9. *Will.* 3. Roll. 747. 2. Salk. 562. Comb. 476. Carth. 444. Ante, 190. Holt, 610. 1. Ld. Ray. 331. 1. Brown's Caſes in Parl 74.

title of the land comes in queſtion, in the other
quoted *Cro. Car.* 138.

And as to THE OTHER POINT, it is well enou
there were ſeveral cloſes called "*Old Ground*,"
out a further addition; and this is only inducemer
Moor 25. In detinue for goods bailed it was
after the bailment the plaintiff married *J. S.* w
the defendant, and held not to be double, for he
the releaſe without ſhewing the marriage. 5.
rule is laid down, that when a man has tw
may plead either of them; and if he canno
without alledging the other, the alledging it
his plea double. *Vide Goulajborough* 88. *Br. D*

And as to the objection, That the plea is the g
is no more than the common bar of *liberum*
enforce the plaintiff to give a more preciſe c
place where the treſpaſs is ſuppoſed; for if he h
treſpaſs was in *Black-Acre*, we could not plead
White-Acre, though *Littleton* and *Brook*, in 21. *E*
contrary opinion; but the matter of inducement
ent with the declaration of the plaintiff, for the d
there are * many cloſes in *Dale*, called as the plai
he ſays they have all additions; and then it is ne
further certainty, ſo that we may know which of
to. And ſeveral of theſe cloſes may be the plain
may be not guilty as to one of them, have a releaſe
and plead an accord with ſatisfaction to a third
cannot do without the plaintiff aſſigns a further
Edw. 4. 80. 81. Treſpaſs laid in two acres of la
defendant pleads that the place where was called b
and pleads to it; and though it was held the decla
ficient certainty *primâ facie*, yet it was held the de

* [508]

third name; and the defendant might have committed ſs in every one of them, and he ought to know for of them the action is brought, that he may diſtinguiſh plea to make. And here calling the place in which the ſs is laid *Old-Ground*, is not ſo certain but it may be more n; and ſuch plea can be no harm to the plaintiff, for if he treſpaſs in any of them, beſides where the defendant juſtie ſhall recover; and if it be only where he juſtifies, he controvert the cauſe of juſtification. *Vide* 9. *Hen.* 6. 5. aſs in *D.* without addition, and there is no *D.* without on; yet if he prove treſpaſs in *D.* it will be for him.

PEEL *againſt* GARLICK.

WELL. *Juſtice.* In aſſize and treſpaſs, which are general, w allows the general plea of *liberum tenementum*, and that common bar; but it will not do where there is a ſpecial ment; but the uſe of it is to enforce the plaintiff to make arge certain, and it is only a favourable plea; for the iff may have a title, of leaſe ſuppoſe, conſiſtent with the ſo if he has ſuch ſpecial title, that plea affords him an opnity of ſhewing it, and *liberum tenementum* is traverſable; eſides if the plaintiff has any other plea, he may come with *et verum eſt*, that it is the defendant's *liberum tenementum*, hew his ſpecial cauſe of action; ſo where the defendant *liberum tenementum*, he gives a plea traverſable; but the here tendered is not traverſable, and yet it puts him ake his title, which ought not to be without allowim a traverſable plea; and beſides, the title may come in ion upon the taking of goods. And one cannot plead his ſion in bar without more, except it be in the caſe of bat, where it may be merely collateral; and the true diverſity is en a declaration and a plea, for one may count upon his ſion without more, but not juſtify by virtue of it; for you ver give poſſeſſion in bar without making a title.

In aſſize and treſpaſs *liberum tenementum* is a good plea, but not where there is a ſpecial aſſignment.

6. Mod. 117. Dyer, 23. 2. Cro. 59. Cro. El. 137. Raſt 548.

Liberum tenementum is traverſable.

* [509]

Poſſeſſion without more, cannot be pleaded in bar, except in caſe of battery.

One may count on poſſeſſion without more, but not juſtify without making a title.

TO THE OTHER POINT, it is very true, when a treſpaſs is a place certain, it bars the other from ſaying that it was other place; but here he does own there is ſuch a place, at it has an addition; but why ſhould not you confeſs the ation, and give in evidence a treſpaſs done in *Old-Ground*, he addition? *Yelv.* 166.

Yelv. 166.

PER CURIAM, Judgment for the plaintiff, *niſi.*

Anonymous.

Caſe 838.

WELL, *Juſtice.* If *A.* promiſe *B.* ten pounds, in conſideration that he would procure him one who would give n annuity of one hundred pounds *per annum* for nine hunpounds, *B.* does not do it, but procures him one who grants one thouſand pounds, and *A.* does agree for that annuity; not bring an *aſſumpſit* for the ten pounds, becauſe this from the contract, but he may have a *quantum meruit.*

Aſſumpſit muſt be on the particular contract.

EASTER TERM,

The Thirteenth of William the Third,

IN

The King's Bench,

At the Sittings

AT

The Guildhall

BEFORE

Sir John Holt, *Knt. Chief Juſtice.*

Caſe 839.

Anonymous.

An action lies to recover money received *in account* to another uſe.

IN account, the caſe on evidence was this: *A.* gives a note to *B.* upon *C.* for *B.* to receive it for the uſe of *A. B.* owes *C.* money, and *C.* upon this note diſcharges *B.* thereof; whereupon *A.* brings his action againſt *B.* and it lies.

Agent not liable for taking inſufficient ſecurity.

HOLT, *Chief Juſtice.* If *A.* be entruſted with the money of *B.* to lay it out, and *A.* lend it to one who paſſes for a ſubſtantial able man at that time, and takes a reaſonable ſecurity for it, as his bond, &c. and afterward the other becomes inſolvent, *A* ſhall not be charged.

Caſe 840.

Anonymous.

Thoſe who abet rioters by *hallooing*, are principal offenders.

AN indictment was againſt ſeveral of the boys of *Chriſt's Hoſpital*, for a riot upon the proſecutor.

It was proved that two of them beat her, and that the reſt only hallooed.

HOLT,

OLT, *Chief Juſtice.* As many as hallooed are abettors, and efore principals in the caſe (*a*).

ut the jury acquitted all but two, wherefore the plaintiff's nſel deſired they ſhould be all acquitted; for two alone cannot uilty of a riot, but there muſt be three at leaſt, and battery ıot be found upon this indictment. Two cannot be guilty of a riot. 2 Hawk. P. C. ch. 65.

(*a*) Sir Rex *v.* Royce, 4. Burr. 2073.

Anonymous. Caſe 841.

A. draw a bill of exchange in payment, and the party does ıot call for the money from *the drawee* in convenient time, ne fail, he ſhall then come upon the drawer. *Sed vid. coment* 408 (*a*). Bill muſt be demanded in convenient time. Ante, p. 203. Poſt. 521.

) That *the payee* or *indorſee* of a bill of ıge muſt apply in convenient time *drawee* for payment of it, in order ıtitle him to recover againſt the r, ſee 3. & 4. *Ann.* c. 9. ſ. 7. rd *v.* Hirſt, 5 Burr. 2671. Gee *v.* n. 2. Stra. 762. Chamberlain *v.* Rine 2. Wilſ 353 Coleman *v.* , 2 Stra. 829. Allen *v.* Dock- 1. Salk. 127 Pepys *v.* Limbert, ra. 707. Anſon *v.* Bailey, Buil. . 276. Appleton *v.* Sweetapple, Eſpin. Dig. 58. Tindal *v.* Brown, 1. Term Rep. 167. Fletcher *v.* Sandys, 2. Stra. 1248. Ward *v* Evans, poſt. 521. Moor *v.* Warren, 1. Stra. 415. Turner *v.* Mead, 2. Stra. 910. Hayward *v.* Bank of England, 1. Stra. 550. Bank of England *v.* Newman, 1. Ld. Ray. 442. Anonymous, 1. Vent. 45. Dagliſh *v.* Witherby, 2. Black. Rep. 747. Brough *v.* Perkins, 2. Ld Ray. 993. Goodall *v.* Dolley, 1. Term Rep. 712.

* [510]

* The King *againſt* Wharton and Others. Caſe 842.

DICTMENT was for riot againſt *Policarpum Wharton,* ıd others; but the cauſe of the riot being the right of a ıte river, A river is the property of the owner of the lands adjoining to its banks. S. C. Holt, 499. Brid. 47.

OLT, *Chief Juſtice.* If a river run contiguouſly between ınd of two perſons, each of them is, of common right, owner ıat part of the river which is next his land; and may let the other, or to a ſtranger.

CONDLY, If one ee his neighbour erecting a thing which ɔe a nuiſance, he cannot abate it till it become an actual nce; ſo the maxim of *Præſtat cautela quàm medela* ho'ds not is caſe. A *nuſance* muſt exiſt before the cauſe of it can be abated.

HIRDLY, If one has a river, and for want of ſcouring it eighbouring land is overflown, he is indictable for it. Landholder indictable for not cleanſing his

ı. 2. Roll. Abr. 137. March, 26. 1. Vent. 90. 183. 189. Cro. Car. 36. . ſ. 11. ch. 76. ſ. 2. Hawk. P. C.

URTHLY, Unlawful aſſembly, riot, and rout, are three dif- t offences. Riot, &c. 2. Hawk. P. C. ch. 65.

EASTER TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Turton, *Knt.*
Sir Littleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Caſe 843.

Palmer *againſt* Stavely.

Indebitatus for money received to the *uſe of defendant* helped by verdict.
S.C. ante, 495.
S. C. Salk. 24.
S.C. Comy. 115.
S.C. 1. Ld. Ray. 669.
4. Mod. 161.
4. Bac. Abr. 96.

CASE upon two ſeveral promiſes, and a verdict on both. The firſt declaration was very ſpecial, ſetting forth that the defendant did ſet up a lottery, and a fraud in the managing it. The ſecond was an *indebitatus*, for money received by the defendant for the plaintiff, and laid *ad uſum* of the defendant.

IT WAS MOVED *in arreſt of judgment*, for *aſſumpſit* lies not for money received by one to his own uſe.

TO WHICH *it was anſwered*, That this being *after verdict*, to underſtand it according to the words of the declaration, would directly contradict the verdict; and ſaying that it was for money received for the plaintiff, was ſufficient, without ſaying *ad uſum*, &c. and therefore the *ad uſum* ſuperfluous, being contradictory, ought to be rejected. *Noſworthy's Caſe* (*a*) in point.

Verdict helps ſuch faults as muſt be given in evidence to obtain a verdict. Ante, p. 422.

And it was laid down for a rule, That whatever imperfection there be in a declaration, if it be ſuch as muſt neceſſarily be given in evidence to obtain a verdict, it ſhall be cured by the verdict. And the caſe of *Paterſon v. Milton* (*b*) was quoted, where the declaration was, that the plaintiff was indebted to the plaintiff,

(*a*) 1. Mod. 92.

(*b*) 4. Mod. 161.

and

at the defendant promiſed to pay; and held good after ver-
. *Sid.* 306. That the defendant being indebted to the plain-
goods ſold and delivered, the plaintiff promiſed to pay to the
ff, good after verdict. 2. *Keb.* * 615. Plaintiff declared, * [511]
e defendant was indebted to him in fifty pounds, for money
d received to the uſe of the defendant; and after verdict
aintiff had judgment.

to this it was objected, That it is very true the Court may
words that are repugnant in themſelves, and inconſiſtent to
went before; but they cannot reject words repugnant or
ctive of what went before, if they are ſenſible: and here it
d ſenſe to ſay, that the defendant received money for the
ff to his own uſe; as if the plaintiff owed the defendant ten
s, and *J. S.* owed the plaintiff ten pounds, and the plain-
points the defendant to receive the ten pounds from *J. S.*
debt; that would be money received by the defendant for
aintiff, to the uſe of the defendant. But it was replied,
t were the caſe, the jury could not have found for the
ff.

LT, *Chief Juſtice.* In debt one never lays a promiſe, but
he debt; but in *aſſumpſit* there is a contract in law to pay
ou received to another's uſe. And though a promiſe be
er ſo expreſs, yet if you do not ſhew the cauſe of the
ſe, it will not bear an *aſſumpſit*, though you give ever ſo juſt
in evidence; becauſe it may be debt by ſpecialty or a rent,
of *aſſumpſits* do not lie, if it be not for forbearance of the
nt after it is due. So it will not be enough to ſay, that
fendant being indebted to you in ſo much money, he pro-
to pay you, even after verdict.

In *aſſumpſit* the cauſe of the promiſe muſt be known.

Ante, p. 16.

here PER CURIAM, Judgment *niſi* was given for the plain-

HOLT, *Chief Juſtice*, informed the Court, that he had the defendant to his good behaviour, for cheating the pub- getting their money into his lottery, and running away at drawing it.

Perſon bound to good behaviour for cheating in a lottery.

See S. C. ante, 495.

Anonymous. Caſe 844.

CURIAM. An heir ſued as ſuch, ſhall no more be held ſpecial bail than an executor (*a*).

Bail by heir.

In what caſes *executors* may be ſee 1. Sid. 63. Comb. 206. 325. 1. Mod. 16. 1. Salk. 98. 1. Term Rep. 716.

The King *againſt* Sims. Caſe 845.

CURIAM. If one brought in, in contempt, deny all on oath, he is of courſe diſcharged of the contempt; but as forſworn himſelf, he may be proſecuted for perjury (*a*).

If contempt be ſworn off, he is diſcharged of contempt.

See 3. Hawk. P. C. 7th edit. ch. 22. ſ. 1. and the caſes cited note *a*.

HOLT

Caſe 846.

Anonymous.

Maſter of ſhip may retain for freight. Ante, p. 447.

HOLT, *Chief Juſtice*. A maſter of a ſhip may keep the goods till he be paid the freight; but if he once part with the poſſeſſion of them, he cannot retake them.

* [512]

Caſe 847.

* Anonymous.

Party oppreſſed, good witneſs in an indictment for it.

HOLT, *Chief Juſtice*. In an indictment for oppreſſion, bat tery, &c the party oppreſſed may be a witneſs (*a*).

And a juſtice of peace's clerk may commit an extortion.

(*a*) See Rex v. Maccarty. Salk. 286. Rex v. Nunez, 2. Stra. 1043. Rex v. Ellis, 1104. Rex v. Bray, Abraham qui tam v. Bunn, 4. Burr. 2257. Rex v. Moiſe, 1. Stra. 505. Anonymous, 1 Mod. 119. and 4. Hawk. P.C. ch. 46. ſect. 14.

Caſe 848.

Anonymous.

Warranty collateral was for the ſecurity of purchaſers.

HOLT, *Chief Juſtice*. The true reaſon of *collateral warranty* was the ſecurity of purchaſers, and for their encouragement; as alſo for the eſtabliſhing and ſettling the eſtates of ſuch as were in by title, or deſcent caſt; and this was the only ſecurity ſuch perſons could have at common law (*a*). And becauſe the eſtates of ſuch perſons as are in by title are much favoured in law, theſe covenants that were for ſtrengthening of them were favoured likewiſe. And in thoſe days there was no need of a *lineal warranty*; but, however, the force of that is taken away by the ſtatute *de Donis*. And common recovery is not upon the ſuppoſition of recompence in value, and never was within the ſtatute; but always as much out of it as if it were ſo mentioned by expreſs words. And this, he ſaid, was my LORD HALE's opinion.

Common recoveries not within the ſtatute *de Donis*.

(*a*) See Littleton, ſect. 705. 707. 2. Black. Com. 301.

Caſe 849.

Mitchel *againſt* Harris.

On a ſubmiſſion to the arbitration of "*A.* ſo that "he makes his award on or "before ſuch a "day, and if he "make no award, then "to the umpirage of ſuch "perſon as *A.* "ſhall chuſe;" *A.* may nominate an umpire before the time allotted to him for making the award has expired.

DEBT upon an award, ſetting forth a ſubmiſſion to the award of *A.* and *B.* provided they make their award by ſuch a day; and, if they did not agree, to the umpirage of ſuch as they ſhould chuſe: "*nul award*" pleaded. The replication confeſſed that there was *no award*, but that the arbitrators had choſe an umpire on ſuch a day, which appeared to be within the time allowed them to make their award in; and ſets forth the umpirage and breach. The defendant rejoined, That they had not choſe any umpire after the laſt day which was allowed them to make their award: to this a demurrer.

And

And it was objected, that it appeared the arbitrators had chose their umpire too soon, *viz.* within the last day allowed themselves for making their award as arbitrators; and such choice was void, for they could not choose an umpire till their own authority were determined; for notwithstanding such choosing of an umpire, they might make an award after any time before the end of the time allowed them.

S. C. Salk. 71. S.C. 1. Ld.Ray. 601. Ante, 120. 2. Lev. 285. 2. Saund. 129. Sayer 221. 1. Mod. 15. 2. Term Rep. 644.

But it was answered, that by this submission the arbitrators had election to make an award, or to choose an umpire * by such a day, and that by chusing the umpire before the day they had determined their election, and given the authority to the umpire.

* [513]

HOLT, *Chief Justice*, quoted the case of *Twiselden v. Travers (a)*, where the submission was to the award of two, "so that they made their award before *Midsummer*; and if they could not agree, to stand the umpirage of such as they should chuse, so as he made his umpirage before the said *Midsummer*;" and they chose an umpire, who made an umpirage before *Midsummer*, and held good; because by the naming an umpire, they had determined their authority and election. But the submission had been "the award of *A.* and *B.* so that they made an award before *Midsummer*, and if they did not agree, *J. S.* should be umpire;" they do not agree, *J. S.* makes an umpirage before *Midsummer*, that umpirage is void.

Nota diversitatem. Otherwise if a particular person be named in the submission.

Judgment *nisi* was given for the plaintiff.

(*a*) 1. Lev. 174. 1. Keb. 848. 935. 2. Keb. 15.

Calladay *against* Pilkington.

Case 850.

IT was doubted, whether a gaoler could detain a prisoner, discharged by the late statute for relief of poor prisoners, for fees. It was said, that TREBY, *Chief Justice* of the common pleas, held he might; for the act being for giving away the right of the subject, it ought to be construed strictly.

An insolvent debtor ordered to be discharged cannot be detained for his fees.

HOLT, *Chief Justice*. Let an act of parliament be ever so meritable, yet if it give away the property of the subject, it ought not to be countenanced.

Anonymous.

Case 851.

HOLT, *Chief Justice*. It was resolved on solemn argument, in the case of *Smith v. Barnaby*, that if one by will devise rent-charge to *A.* in tail, the remainder to *B.* in tail, and *A.* suffers a common recovery to the use of *J. S.* and his heirs, and dies without issue, the remainder is barred.

Remainder in tail of a rent-charge may be barred by recovery.

Anonymous.

Caſe 852. Anonymous.

Wrong recital no error to ſet aſide a judgment.

HOLT, *Chief Juſtice.* In debt, if the original be rec be *attachiat.* inſtead of *ſummonit.* yet we cannot r the judgment, becauſe it is only a recital.

Salk 701. Cro. Eliz. 308. Cro. Jac. 108 Cro. Car. 91. 4. Mod. 246. and Brown gan, Fort. 341. Lockyer v. Chetwynd, Fort. 341.

Caſe 853. Saunders's Caſe.

General iſſue ſhould be pleaded, or colour be given.

* [514]

TRESPASS for entering into the plaintiff's houſe, an ing the poſſeſſion thereof for ſo long; defendant ple *J. S.* was ſeiſed in fee thereof, and he being ſo ſeiſed gave to the defendant to enter into and poſſeſs the * ſaid houſe till him notice to leave it; that thereupon he entered and l houſe for the time mentioned in the declaration, and had notice to leave it all the time; and a ſpecial demurrer, bec plea amounted to the general iſſue.

Ante, p. 97. 101. 121. 376, 377.

And PER CURIAM, He might have given this matte dence againſt all people, except *J. S.* but againſt him have pleaded it. So he ſhould here either have pleaded t ral iſſue, or given colour to the plaintiff.

Therefore judgment was given for the plaintiff.

Caſe 854. The King *againſt* Ruſſell.

Indictment.

RUSSELL was indicted for opening a letter ſent by (*a*), and the caption was, that *per juratores jurat. p rege extit inaictam.* and quaſhed for that (*b*).

(*a*) See 9. *Anne*, c. 10. ſ. 40. and the caſe of Martin v. Ford, 5. Ter. Rep 101.

(*b*) But ſee 4. Hawk. P. ch. 25. ſ. 126.

Caſe 855. Anonymous.

Indictment will not lie on a ſtatute, directing a penalty to be recovered by bill, plaint, or information.

INDICTMENT upon the 35 *Eliz. c.* —. for ma bles of old ſtuff, concluding *contra formam ſtat.* g The penalty given by the ſtatute is four times the valu cables, "to be recovered by bill, plaint, or information."

And it was quaſhed *niſi* upon this exception, that tices of peace have no juriſdiction given them by the ſtat the indictment was taken before them at their quarter-ſeſſ

(*a*) In Smith's Caſe in Trinity Term, 4. Queen *Anne* it was ſo adjudged in a writ of error on an indictment upon the ſtatute of Uſury againſt the lender.—NOTE *to the former edition.*—And ſee upon this ſubj & Rex v. Wright, 1. Burr. 543. Rex v Robinſon, 2. Burr. 799. Rex v. Boyall, 2. Burr. 832. Rex v. Davis, Sayer, 133. Hartley v. Hoo 524. Rex v. Balme, Cowp qui tam v. Knight, 3. Term Rex v. Harris, 4. Term Rep. v. Sainſbury, 4. Term Re Hawk P. C. ch. 25. ſ. 4. p Rex v. Marriot, 1. Show. S. C. 4. Mod. 145.

The King *againſt* Lee.

Caſe 856.

Words ſpoke of a juſtice of peace.

1. Roll. Abr. 56, 57. 1. Vent. 50. 258. Cro. Jac. 59. 1. And. 120. 1. Sid. 67. 1. Lev. 52. 177. 1. Brown's

VE was moved for, to have AN INFORMATION filed againſt
m for theſe words ſpoke of a juſtice of peace, "He is an old
ie for ſending his warrant for me."

T, *Chief Juſtice*. He deſerves to be bound to his good be-
r; though it be not proper for that juſtice to do it, but rather
one of his brothers to do it for him.

l leave was denied, THE COURT deſiring them to go by way
itment if they would.

5. 2. Mod. 26. 7. Mod 107. 1. Stra. 517. 2. Ld. Ray, 1396. 3. Wilſ. rl. 97. 6. Mod. 200.

Anonymous.

Caſe 857.

Factor of common right is to ſell for ready money, unleſs the uſage be otherwiſe.

* [515]

Stra. 1178. 1182. 5. Term Rep. 606.

HOLT, *Chief Juſtice*, at *Guildhall*. Every factor of common
ght is to ſell for ready money. But if he be a factor in a ſort
ing or trade where the uſage is for factors to ſell on truſt, there,
ell to a perſon of good credit at that time, and he afterwards
es inſolvent, the factor * is diſcharged; but otherwiſe if it be
nan notoriouſly diſcredited at the time of the ſale. But
be no ſuch uſage, and he, upon the general authority to ſell,
pon truſt, let the vendee be ever ſo able, the factor is only
able; for in that caſe, the factor having gone beyond his
ity, there is no contract created between the vendee and the
s principal (*a*); and ſuch ſale is a converſion in the factor;
it be not in *market-overt*, no property is thereby altered,
ver will alſo lie againſt vendee: ſo likewiſe if it be in a
-overt, and the vendee knows the factor to ſell as factor.

e Scrimſhire *v.* Alderton, 2. Stra. 107. Drinkwater *v.* Goodwin, Cowp.
Wright *v.* Campbell, 4. Burr. 251. Walker *v.* Birch, 6. Term Rep.
Gonſales *v.* Sladen, Bull. N. P. 281.
ſcot *v.* Milward, Eſpin. Dig.

Anonymous.

Caſe 858.

An action for the falſe return of a *mandamus* is local, and muſt be laid, at the election of the plaintiff, in the county where the return was made, or in the county where the Court ſits in which it is recorded.

S. C. Salk. 669. Ante, 399. 408.

ASE, for a falſe return to a *mandamus* for reſtoring ——— n office in the corporation of *Orford*, which having influence ction of parliament-men, the two factions of WHIG and were deeply engaged in it, and the whole county divided in d the action being laid in *Suffolk*, it was moved at the Bar to t laid in another county, to preſerve the peace and quiet of .

t CURIAM. It is a good cauſe to change *a venue* to preſerve ace of the county; but this action being a local one muſt in ure be brought either in *Suffolk*, where the falſe return was or in *Middleſex*, where it appeared on record; and the iff has his election, by law, of the two counties; and the Court

ANONYMOUS. Court cannot lay it, without his conſent (*a*), in either of the two counties; for it conſiſts of two falſities, of the fact, and the falſity of returning it on record (*b*).

IT WAS AGREED, that in tranſitory actions the plaintiff has not a peremptory election, but the defendant might transfer it to the right county, unleſs the plaintiff would be bound by rule to give material evidence of ſome fact in the county where he laid it. And my *Lord Shafteſbury's Caſe (c)* was ſtrongly urged, where, becauſe of his great intereſt in *London*, an action of *ſcandalum magnatum* laid by him there was removed.

Ante, 121. 401.

HOLT, *Chief Juſtice*, ſaid, that was a caſe of the times, and when things were in a great ferment; and I do not know that that caſe was founded on law and reaſon; for in caſe of *ſcandalum magnatum* it was always ruled the *venue* could not be changed (*d*).

(*a*) Howarth *v.* Willet. 2. Stra. 1180. Southhouſe *v.* Bonk, 2. Stra. 1215. Nichols *v.* Bolſter, 1. Wilſ. 138. Slaughter *v.* Braddock, 4. Burr. 2447. Petit *v.* Berkley, Cowp. 510.

(*b*) But ſee Poole *v.* Bennett, Stra. 874. Mylock *v.* Saladine, 1. Black. Rep. 480. S. C. 3 Burr. 1564. Mayor of Briſtol's Caſe, 1. Wilſ. 77. Rex *v.* Harris, 3. Burr. 1330.

(*c*) Shaftſbury *v.* Craddock, 2. Jones, 192. S. C. 1. Vent. 363. S. C. Skin. 40. S. C. 2 Show. 197.

(*d*) See Lady Falconbridge *v.* Fenwick, Stra. 807. Duke of Norfolk *v.* Alkerton, Salk. 668. 1. Lev. 56. Carth. 400. Lord Griffin *v.* Buckley, Barnes. 482. Gilb. C. P. 90.

* [516]

Caſe 859.

* The King *againſt* Pigot.

Indictment for attempting forcibly to carry away a woman of fortune.

PIGOT was convicted upon an indictment for *a miſdemeanor*, in attempting forcibly to carry away one *Mrs. Heſcott*, a woman of great fortune.

S. C. Holt, 758.

HOLT, *Chief Juſtice*. Surely this concerns all the people in *England* that would diſpoſe of their children well.

And he was fined two hundred marks, and the lady's maid, who was privy to the contrivance, was fined twenty marks, and to go to all the courts with a paper upon her, with her offence written in large characters.

Caſe 860.

The King *againſt* Brown.

Juſtices on view of forcible detainer cannot reſtore poſſeſſion.

HOLT, *Chief Juſtice*. Juſtices of peace, upon their view of a force, cannot meddle with the poſſeſſion; but all they can do is to remove the force, and commit them that uſe it, and to make record thereof.

Ante, 495. Dyer, 187. 1. Sid. 156. 1. Vent. 308. 9. Co. 118. 2. Hawk. P. C. ch. 64. ſ. 50.

Record of commitment ſhould be in the preſent tenſe.

And here the record of the commitment was "*arreſtavi*" in the preterperfect tenſe, and not in the preſent tenſe, as it ought to be, and all records of commitment are; as *committitur marefcallo* in this court.

And the record was quaſhed, *niſi*.

Anonymous.

Anonymous. Caſe 861.

E way upon taking aſſignment of bail-bond is to indorſe a promiſe upon it to ſave the ſheriff harmleſs againſt amercia-; and yet the bond continues ſtill in the ſheriff's cuſtody (*a*).

Aſſignment of bail-bond. Ante, 447.

But ſee now 4. & 5. *Anne*, c. 16. ſ. 20. and Tidd's Pract. 155. Sellon's 183.

Anonymous. Caſe 862.

OLT, *Chief Juſtice*. We may order an attorney of the court to deliver papers which are not his to the owner (*a*).

Attorney ordered to deliver up papers.

See Mr. Dottin's Caſe, 1. Stra. Strong *v.* Howe, 8. Mod. 339. Sir Richard Hughes *v.* Mayre, 3. Term Rep. 275.

The King *againſt* Ward. Caſe 863.

ARD was indicted for barretry, in which caſe the defendant ought to have a copy of the articles to be inſiſted on againſt t the trial beforehand, that he may have an opportunity of ing a defence.

On indictment for barretry, the defendant muſt have a copy of the articles.

5. Mod. 18. 1. Ld. Ray, 490. 2. Atk. 340. 2. Hawk. P. C. ch. 81. ſ. 13.

D HERE a notice left with the defendant's ſervant was ad- ill; and a trial without due notice ought not to ſtand.

Notice of trial left with the defendant's ſervant bad.—Tidd's Pract. 487. 1. Sellon Pract. 405.

D when there is a rule to give a copy of articles, and that is ne, the proſecutor ought not to be admitted at the * trial e any evidence, and then the defendant is of courſe ac-

Where rule is made to give copies, and that not complied with, proſecutor ſhall not give any evidence.

Anonymous. Caſe 864.

N an uſurious contract pleaded, the proof lies all upon the fendant, for by his plea he confeſſed the debt. *Per* HOLT, *Juſtice*.

In uſurious contract, the proof lies on defendant.

See 2. Hawk. P. C. ch. 82. page 386, 387.

Spurraway *againſt* Rogers (*a*). Caſe 865.

E upon a ſpecial promiſe to account. The plaintiff gave ods to ſuch a value and a ſum of money to the defendant, naſter of a ſhip then bound for *India*, who promiſed to bring ie of them home in *India* goods.

Caſe will lie on ſpecial promiſe to account, but upon general delivery of goods account only will lie.—S. C. ante, 501.

(*a*) This was at *niſi prius*, before HOLT, *Chief Juſtice*.

HOLT,

SPURRAWAY *againſt* ROGERS.

HOLT, *Chief Juſtice.* If *A.* take goods from *B.* to acco them, if they come to account, though *A.* gives no true a yet if *B.* has agreed to it, it is well. And if one receive g another, and expreſsly promiſe to be accountable for them give an account of them, caſe will lie, if he will not accou that promiſe; but upon a general bailment of goods, wi particular promiſe to account, there the ſole remedy is by a And if one covenant or promiſe ſpecially upon receipt of g be accountable for them, if he will not account, action u covenant or promiſe will lie; and an action of account li the general receipt.

Caſe 866.

Anonymous.

Bill of exchange taken in payment good, unleſs vendee knew it was a bad one. Poſt. 521.

HOLT, *Chief Juſtice.* If *A.* buy anything of *B.* and g *a goldſmith's bill* in payment, which the vendor accep out exception, if the goldſmith were worth nothing, an know it, it is a good payment; *jecus* if *A.* knew him t failing condition (*a*).

(*a*) But ſee 3. & 4. *Anne*, c. 9. Bank of England *v.* Newman, 1. Ld. Ray. 442. Hankey *v.* Trotman, 1. Black. Rep. Taſſell *v.* Lewis, 1. Ld. Ray. 744. Moor *v.* Warren, 1. Stra. 415. Tinner *v.* Mead, 1. Stra. 416. Manwaring *v.* Harriſon, 1. Stra. 508. Hayward *v.* Bank of England, 1. Stra. 550. Hoare *v.* Da Coſta, 2. Stra. 910. Company *v.* Chitty, 2. St Fletcher *v.* Sandys, 2. Stra. 1 caſe *v.* Hall, Bull. N. P 27 ton *v.* Sweetapple, Bayley o Tindal *v.* Brown, 1. Term and Kyd on Bills, 41 to 46.

Caſe 867.

The King *againſt* Hill.

A maſter of a *grammar-ſchool* muſt be licenſed by the ordinary.

A WRIT of *excommunicato capiendo* iſſued out againſt the *ſignificavit* on which it was grounded, and which cited in the writ, alledged the cauſe of excommunicatio been for non-payment of coſts aſſeſſed againſt him in the court, *in quodam negotio educationis et inſtructionis puero* out licence, without ſhewing what kind of education or in it was.

*[518] And * here it was doubted, whether teaching even a g ſchool without licence were puniſhable in the ſpiritual cou clally ſince 14. *Car.* 2. c. 4. and other ſtatutes inflicting nalty of forty ſhillings a month on ſuch offenders, whereby made a temporal offence. *Vide* 3. *Keb.* 835.

HOLT, *Chief Juſtice.* If there were a canon pro of this matter before the 25. *Hen.* 8. c. 19. it is now confi that ſtatute; and there is A CANON of *Queen Elizabeth* "*Ludi-magiſtris*;" and without doubt ſchool-maſters are in meaſure intruſted with the inſtruction of youth in principl therefore it is neceſſary they ſhould be of ſound doctrine, order thereunto ſubject to the regulation of the ordinary

pro

THE KING *against* HILL.

prohibitions have deservedly gone to stop proceedings for teaching school without licence, because it is a point never yet determined *(a)*.

But THE MAIN POINT gone upon was, Whether there were cause good enough expressed in the writ to give them jurisdiction of the defendant, in the suit in which he was condemned.

A recital in a *significavit* on a writ of *excommunicato capiendo*, that the party was excommunicated for non-payment of costs assessed in the spiritual court *in quodd.am negotio educationis et instructionis puerorum sive aliquâ licentiâ* is so uncertain that the court of king's bench will quash the writ.

And it was urged, that the jurisdiction they would set up in a *causa educationis et instructionis puerorum* was absurd, without mentioning the species of education and instruction; for this might be dancing, fencing, or teaching a trade, music, navigation, &c.; so that though a jurisdiction be granted them over school-masters, yet there is no colour for such a general jurisdiction: and though it may be objected, the Court will give credit to them, yet that is only where they have given themselves jurisdiction the Court will intend they will do justice; but it cannot be intended where they have not given themselves jurisdiction.

And so IT WAS RESOLVED by THE COURT; for a *capias excommunicat.* was not returnable before 5. *Eliz.* c. 23. which directs it to be made returnable in this court; and that the delivery of it to the sheriff be entered on the roll here; and the making it returnable is what gives us jurisdiction; and this must be in all cases of *excommunicato capiendo*; for there are nine causes in which there ought to go an *alias* and *pluries*; and the party, if he do not come within six days after proclamation thereon, is to forfeit ten pounds the first time, twenty pounds the second, and so on. And that the Court may know whether it be for any of these nine causes, the cause ought to be set forth in certain; and it was the design of the statute that the cause should be set out in the writ; and the writ did use to recite the cause even before the statute; and then, if the cause * expressed were insufficient, the way was to go to chancery, and to have a *supersedeas* of the *capias excommunicato*; but that cannot be done now, the writ being returnable here; and they have nothing to do to supersede a writ returnable into another court. *Vide N. B.* 64. *E.* 8. *Cr. Trollop's Case*, 58. So that now this Court are sole judges of the writ and the sufficiency thereof since the statute. And if the writ does not shew a good cause, we have no power to proceed upon it; and therefore if the cause be uncertain, as here it is, it ought to be quashed.

S. C. 1. Salk. 293. Ante, 192. Salk. 672. 7. Mod. 58.

* [519]

Before the statute might apply for *supersedeas* in chancery; now it is returnable in the king's bench; if not good it must be quashed there.

And HOLT, *Chief Justice*, said, he had acquainted the bishops with the matter, wished them to be more concise in their *significavits*, or else they could not have the aid of this court.

(a) But it is now decided, that masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for such licence as to his learning, morality, and religion, Rex *v.* Archbishop of York, 6. Term Rep. 490. and, in a reasonable doubt, may take time to inquire whether he is properly qualified, in every respect, to be entrusted with the education of youth, Rex *v.* Bishop of Litchfield, 7. Mod. 217. S. C. 2. Stra. 1023.; and as the teaching at such a school without a licence is a temporal offence, the spiritual court has no jurisdiction, Jones *v.* Gegg, 7. Mod. 374.

Quære, In treſpaſs with a *continuando*, whether, on executing a writ of enquiry, evidence may be given of damages accruing from the ſame cauſe after the time laid in the declaration.

UPON the executing a writ of enquiry of dama for digging a hole in the plaintiff's ſoil, wher overflown, *continuando tranſgreſſionem* for nine mo inſiſted, that they might give evidence of a conſe after the nine months, as well as in a nuſance whi nine months, and the cauſe is removed, if the effect wards, damage may be recovered for it.

But HOLT, *Chief Juſtice*, ſaid, he was not ſ parity would hold, for the *git* of the action in damage; and therefore as long as there are damages for an action; but treſpaſs is one entire act, and the *git* of the action; and therefore he ſaid he c an action would lie for the continuance of a treſpa a nuſance.

NOTE, In writs of enquiry the jury ſet their ha their verdict.

Caſe 870.

An inventory made by an executor, and found among his papers, is evidence of aſſets.

1. Stra. 95. 401. 1. Wilſ. 170. Bull. N. P. 248.

Lord Petre *againſt* Heneage (*a*

TROVER by the plaintiff, as adminiſtrator *annexo* of the late *Lord Petre*, againſt the wife cutor, for a necklace of pearl, ſaid to have been in t many generations, and worn as a perſonal ornament for the time being, or for default of ſuch by the la *tempore*.

To prove the property, an antient inventory defendant's huſband, being executor of *Lord Petre*, being found among the antient evidences of the f lowed; for the mentioning this necklace in it ſh claim it in his own right; and none but a madman

ere, by HOLT, *Chief Juſtice*, FIRST, The wearing of a converſion *(a)*. Wearing a jewel is a converſion of it.

DLY, Goods in groſs cannot be an heir-loom, but they hings fixed to the freehold, as old benches, tables, &c. *(b)*. What may be *heir looms.*

DLY, A chattel in groſs cannot be deviſed for life, but one e the uſe of a chattel in groſs for life. How a chattel may be deviſed.

Plow. 525. 519, 520. Cro. Car. 346. 1. Bul. 192.

'HLY, If one, before adminiſtration taken out, give away of the inteſtate, and afterwards take out adminiſtration, oid the gift. Adminiſtrator may recal a *gift.*

IFTHLY, The jury cannot carry any evidence from the ut conſent of both ſides, except writings under hand and A jury cannot carry evidence from the Bar.

Richardſon *v.* Atkinſon, Hartop *v.* Hoare, 2. Stra. *v.* Johnſton, 5. Burr. 2825. , 4. Term Rep. 260. imney-pieces, pumps, and Black. Com. 428.; but then is kind are only conſidered t on queſtions concerning heir and executor, 1. H. .; for as between landlord and tenant it is now held, that a tenant may, during his term, take away chimney pieces or wainſcot which he has put up, 1. Atk. 477.; and it has been determined, that a fire-engine erected by a tenant for life ſhall go to his executor, 3. Atk. 13.

(c) See 2. Roll. Abr. 676 686. Cro. Eliz. 411. 616. Co. Lit. 227.

Tidd's Pract. 585.

The King *againſt* Croſs. Caſe 871.

indicted for *a miſdemeanor* in receiving ſtolen goods, ng them to be ſtolen; and the very thief was produced as e *(a)*, who confeſſed the fact, he being brought up by *us ad teſtificandum* from *the Compter*. A principal felon may be witneſs againſt the acceſſary.

Chief Juſtice. Theſe indictments were never thought e before I came upon the Bench, though I have been in it once; but let us try the fact firſt, and it ſhall be afterwards whether the indictment be maintainable. d, ſome Judges would try a trover for goods before an for the taking; but he never would do it, but rather withdrawn, if the matter had proceeded ſo far, that the ight not be nonſuited *(a)*. A *miſdemeanor* at common law is merged in a *felony* by ſtatute. S. C. poſt. 634. S. C. 3. Salk. 193. S. C. 1. Ld. Ray. 711.

plaintiff in this action was bound in a recognizance to he principal felon in forty pounds in court.

e ſtatute 22. *Geo.* 3. c. 58. William Haſlam, Caſes in 325.

as on a motion to arreſt the objection was, that *Will. & Mary*, c. 9. ſ. 4. he knowingly rece ving of *lony*, the offender could not r the *miſdemeanor*; and the conſideration, arreſted the judgment for this reaſon, 1. C. 1. Ld. Ray. 712. But by 1. *Anne*, c. 9. ſ. 1. the receiver may be indicted for the *miſdemeanor*, though the principal be not *convicted*; and by 5. *Anne*, c. 31. ſ. 6. if the principal cannot be taken. See 2. Ld. Ray. 1370. 8. Mod. 264. Caſes in C. L. 98. Foſter's C. L. 374. 5. Term Rep. 83. 4. Hawk. P. C. 7th edit. ch. 89. ſ. 43, 44.

ther's uſe. Poſtea, Hil. 13. *Will.* 3. Waldegrave's Caſe.

remedy had been *account*; for where one receives m no way to diſcharge himſelf of it but payment over, will lie.

Caſe 873. Anonymous.

Sale of goods in *the Strand* does not alter the property.

TROVER was brought of a ſilver cup againſt *the Strand*, and it appeared that his apprentice in the ſhop.

5 Co. 83. 2. Inſt. 713.

And PER OMNES, A ſale of goods in a ſhop in elſewhere out of *London* (*a*), does not alter the pro

Property not changed.

Nor, *per* HOLT, *Chief Juſtice*, Even in *London*, convicted upon the owner's evidence (*b*).

A demand on *an apprentice* not ſufficient in TROVER.

But becauſe he could not prove a demand of *the m* of *the apprentice*, he was nonſuited.

(*a*) The reaſon why it alters the property in *London* is, becauſe a ſale in a ſhop there is in market overt. NOTE *to the former edition.*—But in *London* every ſhop in which goods are publicly expoſed to ſale is market ove only as the owner pu 2. El. Com. 440.

(*b*) Bacon's Uſe of Com. 449.—But ſee

Caſe 874. Ward *againſt* Sir Peter Evar

Note does not diſcharge the debt till paid, if there be no default.

S. C. 2. Ld. Ray. 928. S.C.Comy.Rep. 138.

HOLT, *Chief Juſtice*. If *A.* owe *B.* money, *goldſmith's note* in payment, the debt is not di receives the money, if there be not default in him paid, or if he do not, at the receipt of the note, give for the debt to *A.* (*a*). But if *B.* had an elect *the money* or a *goldſmith's note*, and he choſe the n otherwiſe; and more eſpecially if he give up his f that he had for the original debt.

Anonymous.

Caſe 875.

Chancery will not compel a purchaſe for the benefit of a remainder, or an eſtate tail.

:RY it was agreed to be the conſtant practice of the at if there be covenants to purchaſe an eſtate to ſuch , and money lodged in truſtees for * that purpoſe, the ımpel a purchaſe to be made to the uſes, though the ied before; but if the firſt eſtate is an entail, with ver, and the perſon to take it be living at the time of ıim whoſe money it is, there chancery ſhall not com- e for the ſake of the remainder, becauſe tenant in tail t as ſoon as it is created; and the Court will not do a If a man covenant to purchaſe for him and the heirs of uch a woman, the remainder to his own right heirs, vithout iſſue, and without making any purchaſe, the ot compel the executor to make a purchaſe for the that attached in himſelf, and is extinguiſhed in him.

Anonymous.

Caſe 876.

Legatee may bring bill for diſcovery of aſſets, without making the other legatees parties.

E bring bill againſt an executor for diſcovery of aſſets, bjection that he has not made the other legatees par-

(a) See Mitford's Pleadings, 39. 144. 220.

TRINITY TERM,

The Thirteenth of William the Third

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Turton, *Knt.*
Sir Littleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Caſe 877.

Anonymous.

Time of pleading in abatement. Ante, 504. Skin. 2. 8. Mod. 228. Tidd's Pract. 240.

PER CURIAM. If one will plead in abatement, he muſt do it before the rules are out, and ſhall not have till eſſoins of next Term for it; and formerly the courſe was, to give rules for pleading generally, and after they were out to ſerve rules peremptory. If declaration be delivered before *craſt. Animarum* or *menſem Paſch.* the defendant has not time till next Term to plead in abatement, but only till the rules are out; but if it be * delivered after that time, the defendant has till the eſſoin-day of the next Term to plead in abatement.

* [523]

Caſe 878.

Anonymous.

No coſts on judgment in plea in abatement.

HOLT, *Chief Juſtice.* The late ſtatute, 8. & 9. *Will.* 3. *c.* 11. giving the defendant coſts, does not extend to judgment for him upon demurrer to a plea in abatement.

Ante, 195. Thanon *v.* Lloyd, Salk. 194. S. C. Ld. Ray. 336. Comb. 482. Garland *v.* Extead, 6. Mod. 88. Poſt. 609. 6. Mod. 88. 2. Ld. Ray. 992. Miller *v.* Seagrave, Hullock on Coſts, 150. Aſtley *v.* Young, 2. Burr. 123.

Anonymous.

Anonymous.

Caſe 879.

WRIT OF ERROR was to remove a record "*coram* J. N. *milit.* J. P. *milit. et* Jo. Bl. *milit. Juſt. noſtr. de banco,*" and *lacita* returned were "*coram* G. TREBY, *Chief Juſtice, &c. et ciis.*

Writ of error varying from the record does not remove it.

B. R. H. 131. 1. Term Rep. 240.

And it was moved to quaſh the writ for variance.

HOLT, *Chief Juſtice.* The plaintiff's attorney might have ed execution notwithſtanding this writ, for it was no autho- ty to remove the record.

And the writ was quaſhed *niſi.*

Bidolph *againſt* Veal.

Caſe 880.

WRIT OF ERROR from the court of *Ely*, of a judgment in treſpaſs. The record certified ſet forth a ſummons ſuch a ıy, returnable the ſame day generally; and a return the ſame day f a *ſummoneri*; and thereupon an attachment, and a return the ıme day of a *nil*, and then a *capias* returnable the ſame day; and ıereupon the defendant brought in in cuſtody, declaration, plea, emurrer and judgment, writ of enquiry executed and returned, nd judgment final, all in a day.

Capias made returnable the ſame day the *ſummons* was returnable is error.

Bar. K. B. 409. 2. Wilſ. 117. 3. Wilſ. 454. Black Rep. 918. 1. H. Bl. Rep. 291. Sellon's Pract. 90. 226, 227.

And this was inſiſted for error, that the ſummons being made eturnable generally ſuch a day, the defendant had that whole day to ppear; and then it was erroneous to compel his appearance by *apias* that day.

And that was agreed to by THE COURT; for though in counties alatine and grand ſeſſions of *Wales* they ſplit days and hours, and erhaps they might do the like here, yet having not done ſo, *viz.* ade the proceſs returnable at ſuch an hour of the day, but gene- ally at ſuch a day, as here, it was erroneous to award a *capias* till he day was over; for the *capias* is for the contempt in not ap- earing at the return of the ſummons, and in contempt he could ot be till after the time of the return.

SECONDLY, It was reſolved, that the bare appearance upon the *pias* being compulſory, did not help this error, becauſe it was hat the defendant could not avoid.

THIRDLY, It was reſolved, the omitting to take advantage of then, but pleading over, cured it; for he might have demanded dgment whether he ought to be put to anſwer upon the * *capias*, e return of the *pone* being not yet out.

* [524]

FOURTHLY, It was reſolved, it was not neceſſary to have fifteen ys return of proceſs in a franchiſe; for the reaſon of them in the ourt of *Weſtminſter* is, becauſe that time is judged neceſſary for ople to come from the remote parts, to which the proceſs of oſe courts does extend; which does not hold in franchiſes.

Not neceſſary to have fifteen days to the return of a proceſs in a franchiſe.

BIDGLER *against* VEAL.

FIFTHLY, The judgment was reverſed for this error, *viz.* that the writ of error is executed the ſame day with the *pone's* return, and ſo might be before any *pone* iſſued out; and no appearance and pleading can help that.

Jud. reverſet.

Caſe 881. Fox *againſt* Thexton.

Germs of oak not cut till after twenty years not tithable.

2. Inſt. 643. 1. Lev. 189. 1. Sid. 300. Cro. *Eliz.* 1. 55.

PER CURIAM. Of germs of oak growing not of a root, the tree whereof was twenty years old when cut, there ſhall be tithes paid; for oak or other timber cut under that age ſhall pay tithes as other underwood; but if the oak or other timber-tree was twenty years old when cut, it was not tithable, and for that the germs of the roots of ſuch trees cut at that age ſhall pay no tithe. 2. *Inſt.* 463.

Bunb. 98. 1. Roll. Abr 640. 2. Leon. 79. 11. Co. 48. Cro. Jac. 100. Mcor, 908. 3. Com. Dig. "Diſmes" (H. 4.)

Caſe 882. Slanney *againſt* Slanney.

Plea put in after rules for pleading were out, beginning in bar and concluding in abatement.

S. C. 1. Ld. Ray. 694.

DEBT UPON A BOND. A declaration was delivered before *menſem Paſch.* and a plea put in after the rules of pleading were out, beginning with *actio non*, and concluding in abatement.

The doubt was, Whether this were not a diſcontinuance.

And it was ſaid, the Books ran both ways; and agreed, if it be taken in abatement, it came too late, the rules being out. And the caſe of *Liſſe v. Harcourt* (*a*) was quoted, where an attainder in diſability of the perſon was pleaded thus; and the plaintiff replied, demanding judgment of damages, ſhewing that it was a diſcontinuance, matter of abatement being pleaded in bar; and ſaid, if the plaintiff had pleaded matter of fact, anſwering a matter pleaded in abatement, a concluſion of a prayer of damages had been proper; but where he does not reply ſuch a fact, he only ought to pray that his writ be adjudged good; for if upon trial of matter of fact pleaded in abatement, the iſſue be for the plaintiff, he ſhall have judgment final: and the caſe of *Medina v. Stanten* (*b*), here * before was quoted.

* [525]

Where *reſpondeas ouſter* is awarded when the judgment ſhould have been final, it is not error.

HOLT, *Chief Juſtice.* Where the Court awards a *reſpondeas ouſter*, when the judgment ought to be final, it can do no harm, becauſe the defendant cannot aſſign it for error, no more than he can the awarding an eſſoin when it ought not to have been, being for his advantage.

If plea be for matter appearing in the writ, *judicium de brevi* is proper; but if for matter *ab extra* it may be ſo, or otherwiſe in abatement.

At another day he ſaid, the defendant begins with an *actio non*, becauſe the plaintiff is outlawed in the common pleas, and *pet. jud. de brevi*, which is a clear plea in abatement. And *Mo.* 30. was quoted, where it is held, that if the plea be for any matter appearing in the writ, it is proper to conclude with a *jud. de brevi*; but

(*a*) (*b*)

if

ıe for any thing out of the writ, as jointenancy, or the like, the luſion may be with a *judicium de brevi*, or otherwiſe in abate- : : if one begin in abatement, and conclude to action, it is ill, if lea be not ſufficient in bar according to the concluſion; and if ırrer be to ſuch plea in that caſe, judgment ſhall be againſt the ıdant, for his concluſion affirms the writ good; but if the plea nence in bar with a good matter, and conclude to writ abate- ; it will be well, for the plaintiff cannot have a good writ, if he ıot a good cauſe of action. 36. *Hen.* 6. 18. And it was ſaid, the principal caſe the plaintiff had demurred, or replied in bar, the Court were of opinion that it was a plea in abatement, aps it would be a diſcontinuance.

SLANNEY *againſt* SLANNEY.

If begin in abatement, and concluſion to action, it is ill, if plea in bar be not ſufficient.

If plea commence in bar with good matter, and conclude in abatement to the writ, it is well.

t laſt the rule was for the defendant to conclude his plea well, then judgment ſhould go according to the goodneſs of the er; for if this be made in abatement, it is irregular after the ; are out. Therefore let defendant ſhew cauſe why he ſhould conclude in bar; for theſe irregularities in pleading ſhould not ncouraged to inveigle the Court.

Anonymous. Caſe 883.

OLT, *Chief Juſtice*. Bail was excepted againſt in Vacation, and no other put in, nor bail juſtified till Term; and then the cipal would ſurrender himſelf in diſcharge of the bail; and that ould not do, for bail can never ſurrender, nor the party come in vay of ſurrender, but at the return of a proceſs, or when he is ourt by his bail. If ſheriff return a *cepi corpus* upon a *diſtringas*, cipal may ſurrender himſelf, but bail excepted againſt is as no till changed or juſtified.

Bail can never ſurrender, or party come in by way of ſurrender, but at return of proceſs, or when he is in court by bail.

Anonymous. Caſe 884.

R CURIAM. When it is moved to have ſubmiſſion to award nade a rule of Court, there ought always to be an affidavit of e, becauſe the act gives the Court power to examine the e of the award.

Notice ſhould be of motion to make ſubmiſſion to award a rule of Court.

See Sellon's Practice, 2. vol. 343 to 356. Tidd's Practice, 540. 547.

* Maddox *againſt* ———. Caſe 885.

ROHIBITION was moved for to ſtay a ſuit in the court of admiralty brought by *a ſurgeon* of a ſhip for his wages; and aggeſtion was, that all was paid to the maſter.

Suit in admiralty for ſurgeon's wages.

Bunb. 121.

ER CURIAM. Payment to the maſter is not payment to the en, but the ſhip itſelf is liable for their wages; and they would Counſel.

Berty

Caſe 886. Berty *againſt* Dormer.

Averring lands are deficient in value puts the proof on the pleader.

ISSUE directed out of chancery was, Whether land aſſig payment of a legacy were deficient in value; and iſſue wa upon the deficiency, the one alledging that it was deficient, other that it was not.

PER CURIAM. Though averring that it was deficient an affirmative as implies a negative, yet it is ſuch an affi as turns the proof on thoſe that plead it. If he had joined that the lands were not of value, and the other had aver they were, the proof then had lain on the other ſide. If o *infra ætatem*, which is no more than that he is not of a iſſue is thereupon, he that pleads the *infra ætatem* muſt pr

HOLT, *Chief Juſtice*. The common way of appriſi herbage is two ſhillings in twenty.

And if one deviſe lands to the value of one hundred p year to another, it is *prima facie* the beſt rule of valuatio mate them at the value they were at the death of the devi

Caſe 887. Taylor *againſt* Brudon.

Nonſuit for non-delivery of declaration. Sellen's Pract. 241. 2. Term Rep. 112. 3. Term Rep. 123. 5. Term Rep. 36. Tidd's Practice, 201.

HOLT, *Chief Juſtice*. Upon common bail filed, if on deliver declaration before the end of two Terms, h nonſuited.

Common bail.

SECONDLY, If, upon examination before a Judge, on make out a good cauſe of action, common bail ſhall be ord

When a Judge's order ſhould be final.

THIRDLY, And if, upon examination before a Judge, bail be ordered, and the plaintiff do not there declare that move the Court, or give notice of ſuch his intent to the de the Judge's rule ſhall be final to him.

Demand of a declaration. Tidd's Practice, 219. 221.

FOURTHLY, And if the plaintiff has ſeveral attornies, a of a declaration of any of them is good.

* [527] * Anonymous.

Caſe 888.

A blank warrant is bad. See Burſlem v. Fern, 2. Will. 47.

HOLT, *Chief Juſtice*. The ſheriff ought not to make warrant, for the attorney to fill with a ſpecial bailiff.

Acceptance of bail bond diſcharges the ſheriff.

SECONDLY. If the ſheriff take inſufficient bail, and th tiff's attorney accepts of an aſſignment of it, he thereby diſ the ſheriff from amercements (*a*).

(*a*) See Tidd's Pract. 160. 165.

THE

IRDLY, The ſheriff upon aſſignment does not part with the on of the bond (*a*), becauſe if the plaintiff be non-ſuited, riff muſt be indemnified; but he muſt produce it at the

Formerly on aſſignment the bail bonds remained with ſheriff.
Ante, 516.
Ante, 447.

(*a*) But ſee 4. and 5. *Anne*, *c.* 16. *ſ.* 20. Tidd's Pract. 154.

Anonymous. Caſe 889.

CURIAM. If one has ſeveral cauſes of action, each hereof is too ſmall for ſpecial bail, he cannot join them to e ſpecial bail.

Several cauſes of action cannot be joined to have ſpecial bail.

Parker *againſt* Atfield. Caſe 890.

BT upon a bond for twenty pounds againſt an executor, who leads that the teſtator was indebted in one hundred pounds *S. ultra quod* he had not aſſets. *Replication*, That the ent was kept up by fraud, and the party to whom the judg- was, willing to take twelve ſhillings for it. *Rejoind.* That not by fraud, and that he had not aſſets but to the value of unds; and a demurrer,

If executor pleads a judgment generally, he confeſſes aſſets for ſo much, and cannot after ſay he has aſſets to a leſs value.
S. C. 1. Salk. 311.
S. C. 1. Ld. Ray. 678.

auſe that when an executor pleads a judgment generally, reby confeſſes aſſets for ſo much, and afterwards he cannot and ſay he has aſſets but to a leſs value.

LT, *Chief Juſtice.* The fair way for an executor is to plead dgment, and ſhew how much is due upon it; and then to at he has not aſſets but to ſo much; and that is the honeſt f doing it: for if a judgment be pleaded in its full extent of alty thereof, and the plaintiff replies that there is but ſo due, or that the party is willing to take ſo much, or that kept up by fraud, and iſſue is thereupon joined; if it be by the jury that the executor has not wherewithal to ſatisfy ſhall not be charged for more, becauſe there he is not of fraud. If there be three judgments of twenty pounds and the executor has aſſets only to the value of twenty s, and he pleads theſe three judgments, which in all amount ty pounds; if any one of them be ill pleaded, or iſſue be , and found that any of them is kept up by fraud, the ex- r has confeſſed aſſets for that judgment that is ill-pleaded, up by fraud, &c.; but if the plaintiff deſire to have judgment aſſets deſcend, and ſo admits * your plea to be true, then eſtion is, whether the executor, having but twenty pounds nd, and forty pounds come to him, being juſt enough to the three judgments pleaded, he ſhall not be liable to the iff's execution, who took judgment to execute when aſſets And he ſhall not; for he has pleaded thoſe judgments, he plaintiff demands judgment to execute when aſſets came

Executor in pleading a judgment, ſhould ſay how much is due on it.

* [528]

If executor pleads judgment, which is ill-pleaded, or on iſſue found to be kept on foot by fraud, he has confeſſed aſſets for it.
If on judgments pleaded, plaintiff prays judgment when aſſets come, he ſhall not be chargeable till thoſe are paid.

after

and honeſtly; and to hold them to this, is the w
tors honeſt, and to reduce matters into certain
no aſſets at all, his beſt way had been to ple
ſpecialties in their order; but he muſt take c
honeſtly, for if any one of them be falſe, he is g
if there be a miſtake in the pleading, or fraud,
if iſſue be taken upon the fraud, and it is found
found to have aſſets for the whole judgment, it
Fraud is traverſable. ed you have more than you confeſſed, for the
thing traverſable.

And GOULD, *Juſtice*, quoted the caſe of *V*
and *Workhouſe v. Simon* (*b*), that iſſue muſt
fraud; for if you reply a compoſition made,
judgment is continued by fraud; ſtill it is the f
ſable. And if one plead ten judgments, and
fraud, he has confeſſed aſſets at leaſt to the full
2. Saund. 50. *contra.* ment: and he ſaid it had been held in the common
in the compoſition had been well; but a writ of
the judgment reverſed here, for the fraud only

Judgment was given for the plaintiff.

(*a*) Vide v. Cateſdon, 1. Jones, 91. (*b*) 3. Keb. 162. 418.

Caſe 891.

* Anonymous (*a*).

An imparlance. *Salvis ſibi omnibus exceptionibus* can only be granted by the Court, and after that the defendant may plead in abatement to the

ONE came to the prothonotary for an im
and having got it entered thus, "*ſalvis*
"*onibus & advantagiis tam ad juriſdictionem c*
afterwards would plead to the juriſdiction of the

POWELL, *Juſtice*. There are two ſorts of im
general, after which one cannot plead in ab
other ſpecial, with a "*ſalvis ſibi omnibus e*

of the Court (*a*), and is diſcretionary; and after which one to plead to the juriſdiction of the Court. ANONYMOUS.

and a *reſpondeas ouſter* was awarded, and it was ordered to be ſaid for reaſon, on the roll ſpecially, that it was obtained with-leave of Court.

Grant *v.* Lord Sondes, 2. Black. Rep. 1094. Brewſter *v.* Capper, 1. Black. Rep. 1. Wilſ. 261.

Caſe 892.

Lancaſhire *againſt* Killingworth.

Tender muſt be alledged the laſt convenient time of the day. S. C. 2. Salk. 623. S. C. 3. Salk. 342. S. C. 1. Ld. Ray. 686. S. C. Comy. Rep. 116. Poſtea, p. 531. Say. Rep. 189.

THE defendant covenanted with the plaintiff, that upon two days notice within a year, to be given at *Hudſon's Bay Houſe*, he ſhould accept of one thouſand pounds ſtock in ſuch a Company, and would pay two thouſand pounds at the transferring thereof. The declaration avers, that within the year, *viz.* ſuch a day, he gave notice in writing for *K.* the defendant, to come to *Hudſon's Houſe* the fourth of *November*, which was alſo within the time to accept the transfer; that the plaintiff was there on the day ready, and did tender a transfer of the ſaid ſtock to the defendant, but that the defendant did not come and accept it, or pay the two thouſand pounds. Upon this declaration there was a demurrer.

The queſtion is, Whether upon this declaration the plaintiff ought to have judgment for the defendant's not accepting the ſtock, or paying the money?

And HOLT, *Chief Juſtice*, who delivered the opinion of the Court, argued thus: It does appear that the money was to be paid upon transfer of the ſtock; and it is to be admitted, that when the money was to be paid upon the transferring of the * ſtock, and nothing any other thing, if he that is to make the transfer, or do any other thing, make tender, and the other refuſe, then he is as well intitled to the money, as if the transfer, or other thing, had been actually done; for though the words be, *that the money ſhall be paid upon the transfer*, yet if the party does all that lies in him, he is thereupon as much intitled to the money, as if he had done it effectually.

* [530]

But the queſtion will be, Whether there be a ſufficient tender or not? And we all hold that there is not, but that it is defective, and therefore the plaintiff cannot recover: he avers that he was ready, and did at the time and place appointed offer to make a transfer, but the defendant did not accept it; and in this is the breach of his declaration. Suppoſe the defendant had been there, and he had tendered it to him, and the other refuſed, he ought to have averred the tender and refuſal; and in that caſe, to aver a tender without averring a refuſal likewiſe, would not do. 16. *El.* B. R. 17. *Ed.* 3. 11. That pleading of tender with omiſſion of refuſal is not good, and ſo are many new Books. 1. *Sid.* 13. Action upon a promiſe, that the defendant, in conſideration that the plaintiff would pay him a certain ſum of money, promiſed to aſſign him a term;

Poſtea, p. 531. If tender is made to the defendant, and he refuſes, that refuſal ſhould be averred, elſe it is ill on demurrer, but helped by verdict.

of opinion, that the tender without averment c
good, but being after verdict it was held w
Buckley v. Millerd.

If time and place be appointed for doing a thing, and the party to whom it is to be don., is not present, tender at the place the laſt convenient time muſt be alledged.

Then there is another way of pleading a t
place be appointed for the doing of the act. If
do it come, and he to whom it is to be done
he ought in his declaration to alledge that he w
place, and tendered, but no body came to recei
if the party, to * whom the thing is to be don
is this further conſiderable in averring a tender
of day to make the tender: if there be time a
the party cannot come at any time of the day
but in ſuch caſe the law hath appointed the la
on which the thing can be conveniently done,
made; for it cannot be in the morning, nor at
but the laſt time on which it may conveniently
party muſt ſtay till then. 5. *Co.* 114. *Wade's*
Exception was taken to a pleader of a tende
becauſe it was not ſaid at what time of the day
might have come and made tender at a time
by law, in the ſame day.

Peake, 532. If refuſal be averred, it is good evidence of a tender to the perſon, which would be good at any time of the day.

Holt. If he had averred a refuſal to a
would be good evidence of a tender to his perſ
have been good at any time of the day; an
tender and refuſal on the plaintiff's ſide wou
without telling on what time of the day the te
cauſe the averring a refuſal implies the defend
who ought to accept it; but if the party were r
to be ſhewed that he did not come, and that
made tender on the time of the day on which t
be done; and that is the laſt time of the day
done conveniently

. But a tender being pleaded, and that he was not there to receive it, was held good, without ſaying, that no body was there for him. 3. *Cr.* 734. 2. *Cr.* 13. *Yelv.* 38. For if body had been there on his behalf, that ought to come of his and it ſhall not be intended if they do not ſhew it. And what reaſon of this? This is it: when a man has covenanted and ed to do a thing, in excuſe of himſelf, for not doing thereof rding to agreement, he ought to ſhew that he has done his ut- endeavour to perform it, and ſhew how it came to paſs that d not, or could not do it. And here was an agreement by plaintiff to transfer his ſtock; and hereupon the money was to aid: the plaintiff indeed ſays he tendered the transfer, * and ews he did whatever he could do towards the performance of greement; but that is not enough, for he ought likewiſe to how it came to paſs that it was not performed; as that the ndant was there and refuſed to accept, or was not there at all, the laſt convenient time of the day which the law appoints oing the matter. And all this the plaintiff ought to ſhew to e himſelf to this action.

Tender pleaded, and that was not there to receive it, good, without ſaying, nor no one elſe for him.

* [532]

Where perſon agrees to do a thing, he muſt ſhew he has done all in his power to perform it.

pon this reaſon of law is the caſe in 8. *Co.* 92. One makes a feoff- t, upon condition that the feoffee ſhould re-infeoff the feoffor; or binds himſelf in a bond to infeoff obligee by ſuch a day, and before lay the feoffee, or obligor, is diſſeiſed by him that was to be in- ed, and then the bond is put in ſuit, it is not a good plea to ſay you were always ready to infeoff him, but that he himſelf before ay ouſted you; but you muſt proceed farther, and ſay, that he you out of the poſſeſſion till after the day, with force; for gh he had interrupted you, perhaps you might have come the land afterwards and performed the agreement, or make a r, which if he refuſed would have been tantamount; for you t not only to ſhew a diſturbance by him, but alſo ſuch con- nce of that diſturbance as made it impoſſible for you to per- on your ſide; and in that caſe he ought to ſhew, that he came deavour to make a feoffment, but could not do it by reaſon e force he met with from the plaintiff; and that had been a excuſe: for if he, to whom a thing is to be done, hinder the that is to do it ever ſo much; yet the other muſt uſe his ut- endeavour on his ſide to perform; and ſhew that he has done elſe he forfeits his bond, or breaks his agreement. 3. *Cr.* 694. ery remarkable caſe: The condition of a bond was, that be- ſuch a day the obligor would procure ſuch a woman to marry bligee; the obligee goes to her, and tells her, how barbarouſly ould uſe her if ſhe married him, and called her "*whore*," hreatened to tie her to a poſt, and told her ſuch things, that oman in her ſenſes would marry ſuch a man; after the day, was brought upon the bond, and this matter ſpecially pleaded r; and adjudged to be no good plea, but that, notwithſtanding menaces, the obligor ought to have ſhewed that he had done moſt endeavour to procure her to marry him, but that ſhe

by

LANCASHIRE *againſt* KILLINGWORTH.

by reaſon of the menaces refuſed, and ſo he was hindered by the plaintiff.

* [533]

* *Heb.* 177. An award to enter into a bond to another, it is not enough for the party to bring a bond written, and to ſay *I will ſeal and deliver you this bond*; but he muſt bring the writing with a ſeal clapped upon it, and ſay, *I deliver you this as my act and deed*; and if he omits the doing of any one thing that is eſſentially neceſſary to the executing a deed, he has not performed the award.

There is one thing of what I have ſaid may be liable to exception, eſpecially in a caſe of transferring a Company's ſtock, which is mentioned in the caſe of *Shales* and *Seignoret*; this transfer was to have been made in the book of the *Hudſon's-Bay* Company, and they have ſet hours on which their books are open; and to ſay that he was there to make transfer, and tendered it at a time which is the laſt convenient time of the day, might be in vain; becauſe by the uſage of the Company, the books are not then open, and therefore no transfer could be; and a tender, when no transfer could be, would be void.

When time is left indefinite, it is the laſt convenient time of the day; but if by uſage of a Company, the time of transfer is at a ſet time, that muſt be averred.

Anſw. If the agreement leaves it indefinite at ſuch a day, the law knows no other time but the laſt convenient time of that day; but if a uſage be averred, that the time for transferring is between ſuch an hour and ſuch an hour, there it ought to be averred, that he came within the ultimate convenient time by the uſage, and that will be well; as if the uſage be, that the books are open till ſix o'clock only; the proper time to come will be about five, and to ſtay till ſix.

And judgment for defendant PER TOTAM CURIAM.

Caſe 893.

Furlong *againſt* Thornigold.

If only part of an award be ſet forth, and concludes with a *profert*, if the defendant craves *oyer* and demurs, it is ill for the variance.

Cro. Eliz. 861. 904.
2. Lev. 235.
2. Show. 61.
Kyd on Awards, 192. 196.

DEBT UPON A BOND for the performance of an award; "and "*award*" pleaded; the plaintiff ſets forth part of the award, but not all, and concludes with a *profert*; the defendant craves *oyer*, and the award being ſet forth at large, demurs generally, for the variance between the award replied, and that ſet forth on the *oyer*; and *Smith v. Yeoman*, 1. *Saund.* 319. was quoted, where the plaintiff in ſuch caſe ought not only to ſet forth the award, but (*a*) alſo to aſſign a breach.

* [534]

But it was objected, that it is enough to ſhew ſo much of the award, as to give himſelf cauſe of action, and to ſhew the award good, that is mutual; and if there be anything more in it, it ought to come of the defendant's ſide; as in caſe of an action upon an act of parliament. *Vide* 1. *Leo.* 72. In debt upon an award, nothing was ſet forth but the * ſubmiſſion to the award of *J. S.* and that he awarded the defendant to pay the plaintiff ten pounds, and

(*a*) See Foreland *v.* Marygold, 1. Salk. 72. S C. 1. Ld. Ray. 715. and Perry *v.* Nicholſon, 1. Burr. 278.

held

he action did lie, and that the plaintiff is bound to ſhew no than does for him, and the reſt ought to come of the de- nt's ſide. *Vide Lewis v. Scholaſtica* in *Plow.* that one need o more than is for his purpoſe. *Palmer*, 511. that in or- f good pleading, that when the defendant pleads *nullum fece- arbitrium*, and the plaintiff ſhews an award and breach, the dant ought to rejoin *nullum tale fecerunt arbitrium*.

FURLONG *againſt* THORNIGOLD.

LT, *Chief Juſtice*. You ſet out too little or too much; for o not ſet out the whole award, but you ſay *profert*, as if you t it out. But the queſtion will be, Whether it will not be n a general demurrer? 2. *Rich.* 3. 13. The iſſue is *non at hoc arbitrium*; but ſuppoſe part of the award be well, and er part void, and ſo bad that it avoids even the whole award, e plaintiff ſets out only the good part, *et nullum tale fecerunt ium* be pleaded, and then the whole award is ſet out. dw. 4. 32. *Bro. Arbit.* 39. 41. But in thoſe days they n award void in part to be ſo in all; as award that there d be mutual releaſes for the purpoſe, and that one of the s ſhould get a third perſon to be ſecurity for the payment of ounds to the other, ſuch award would have been held void *in* thoſe days; and ſo was the law held all along until *King James irſt's* time, when, as appears in *Hobart* and *Hutton*, it was n award might be good in part, and void in part. But here s ſaid, that the plaintiff ought to ſet forth all the things led to be done by him, though perhaps he need not ſet out thing to be done of the other ſide; and the omiſſion hereof declaration, and ſetting it out in the other part, is a ſubſtantial ce. But if a void part of the award be omitted, ſo it be ſuch l part as does not avoid the whole award, that may be well gh; for where an award contains ſeveral matters to be done e plaintiff's ſide, all which are well awarded, and to be per- d by the plaintiff, and he only ſets out enough to intitle him- an action, and they come and plead "no award," and, upon f the award, it appears the plaintiff was to do more than he rth, and that thoſe things were well awarded, that is, that ward was legal as to them; the queſtion is, Whether he not to ſhew all thoſe things that he was to perform, or if nitting any of them be not a ſubſtantial variance? It was ſaid, n debt upon an award he need only ſet out * enough to intitle lf to action; but that he ought to ſhew ſo much of the award s neceſſary to make it good.

Award may be good in part, and void in part.

If a void part of an award be omitted to be ſet forth, it is well.

* [535]

d HOLT, *Chief Juſtice*, ſeemed to approve of the caſe in o. 72. *vid. Style*, 98. 1. *Sid.* 161. that debt lies upon an l, without ſetting it all out. But here the variance was held rial.

d judgment was given for the defendant.

Case 894.

Wilbraham *againſt* Lownds.

Treſpaſs in the king's bench, for treſpaſs committed on lands in the county palatine of *Cheſter.*

TRESPASS *quare clauſum fregit* in *Cheſhire*; and it was pleaded, that this Court ought not to take conuſance of it, for that the defendant, at the time of the ſuppoſed treſpaſs and bill exhibited, was an inhabitant of the county palatine where the treſpaſs was made; "*et petunt jud.* if this Court will take conuſance;" to which there was a demurrer:

In maintenance whereof it was ſaid, that the declaration was againſt him *in cuſtodiâ mareſchalli*; that his being in cuſtody of the marſhal was not traverſable, no more than being the king's creditor in a *quo minus.* Beſides, the defendant's being an inhabitant of the county palatine, does not hinder his being an inhabitant out of it; for a man may be an inhabitant in ſeveral places at once; and in all appeals and indictments of murder, the party is alledged to be an inhabitant in the place where the murder is committed.

A man's being the king's creditor in a *quo minus* is traverſable.

If a perſon is in cuſtody of the marſhal for cauſe, may proceed againſt him for a cauſe ariſing in the county palatine.

Any plea of privilege is good to a declaration againſt one *in cuſtod. mar.* if he be there wrongfully.

HOLT, *Chief Juſtice.* As to your caſe of *quo minus*, it is traverſable, if the party come in due time to do it. And if one be a priſoner here, againſt whom one has a cauſe of action ariſing within the county palatine, ſo that his being a priſoner here hinders that perſon from proceeding againſt him below, ſurely the cauſe's ariſing within the county palatine ſhall not hinder us from having conuſance of it here; but that is where he is firſt in cuſtody of the marſhal for cauſe, and another, or the ſame party, has another cauſe of action ariſing againſt him in the county palatine; and if the truth were ſo, that the defendant was in cuſtody of the marſhal before, for a cauſe ariſing within our juriſdiction, the defendant inſtead of demurring ought to ſhew it in ſupport of our juriſdiction. But any plea of privilege is good to a declaration againſt one *in cuſtodiâ mareſchalli*, if he was brought wrongfully there. As if an attorney of the common pleas be arreſted upon a *latitat*, and is in cuſtody of the marſhal for want of bail, or ſuppoſe he puts in bail, it ſhall not hinder him of pleading his privilege; becauſe he * cannot plead till he put in bail, if he be not in actual cuſtody; and if we give judgment, it muſt be for the defendant.

* [536] Ante, 113.

Case 895.

Lancaſter *againſt* Lovelace.

Title to hold a court "according to the cuſtom of *the court* aforeſaid," is well pleaded.
8. Co. 133.
Moor, 422.
Owen, 50.

ERROR of a judgment in the court of *Canterbury.* FIRST, It was excepted, that in making title to a court they laid to be a court by preſcription *ſecundum conſuetudinem curiæ præd.*; and that was abſurd to lay a cuſtom in a court to hold a court, but it ſhould be laid in the city, &c.

Sed non allocatur, upon the authority of *Anneſie's Caſe*, where the ſame exception was over-ruled; but beſides, this was laid to

Cro. Jac. 184. 493. Yelv. 46. 1. Sid. 311. 1. Salk. 265. 2. Ld. Ray. 1543.

be

art time out of mind, according to the cuſtom of the ſaid and confirmed by charter.

LANCASTER *againſt* LOVELACE.

ND EXCEPTION, It does not appear that the juriſdiction court was co-extenſive with the city; and they alledge the action only to have ariſen within the city.

Defendant's appearance cures a defective ſtatement of the juriſdiction of an inferior court.

IT WAS SAID, that the defendant coming in and anſwer- waived that advantage.

RDLY, That the *venire* was, "*venire facias, &c. duode- &c.*" which ought to be ſet forth at large in caſe of an court, where no *diminution* may be alledged; and the rea- ſuch entries are allowed in the ſuperior courts is, becauſe alledge diminution, and thereupon have the matter cer- large; *vide* 1. *Cro.* 164. 1. *Roll. Abr.* 800. *Style*, 20. 5. 1. *Roll. Abr.* 801. *pl.* 20. But againſt this was quoted 10. *Raym.* 217, 218. 2. *Keb.* 383. where this exception r-ruled.

Diminution cannot be alledged to an inferior court.

r, *Chief Juſtice.* They muſt ſet forth the proceedings as by the award of the Court, for no *diminution* lies to them; dvantages muſt be taken againſt the matter, as it appears ecord; and we muſt take the *venire facias* to have been as it is entered on the roll; and he ſaid, there was never ent of entries in an inferior court in *Raſtall.*

r, *Chief Juſtice*, at another day: The want of "*quorum t, &c.*" may be well, becauſe it is "*duodecim de inhabi- us* of the city;" but the want of filing the *qui nec* ſeems to nce, and therefore fatal. *Qui nec* ought not to be in the aſe, becauſe none can be of kin to the king; but there it ly be *qui non attingat* the ſubject *aliquâ affinitate.*

er CLERK, on the civil ſide, They always file the writ, on the crown ſide.

ER CURIAM, Before juſtices of gaol-delivery, there is no rrant for a jury but the award on the roll.

* [537]

* Anonymous. Caſe 896.

r, *Chief Juſtice.* If one would plead a plea amounting he general iſſue, he ought to give the defendant *colour*, preſs or implied.

Colour. Ante, 377.

Hall *againſt* Bond. Caſe 897.

by an adminiſtrator *cui adminiſtratio debito modo commiſſa* ; the defendant pleads over.

Suit by adminiſtrator *cui adminiſt. debito modo commiſſa*, ill on demurrer, but good by pleading over.

HALL *against* BOND.

PER CURIAM. This had been bad if demurred unto, now helped by your pleading over; for you thereby admit a right of ſuit, and is adminiſtrator.

Caſe 898.

May *againſt* King.

To an *indebitatus aſſumpſit* for *forty pounds* for work and labour, A PLEA that there were mutual dealings between the plaintiff and the defendant; that they *accounted together*; and that thereupon the defendant was found in arrear only *five pounds*, *&c.* is bad; for it amounts to the *general iſſue*, and may be given in evidence thereon.

S. C. Comy. Rep. 116. S. C. 1. Ld. Ray. 680. 1. Burr. Rep. 9. Cro. Car. 384. 3. Lev. 238. Ray. 42. Fitzg. 202. Comy. Rep. 98. 1. Ld. Ray. 235.

* [538]

1. Com. Dig. "*Aſſumpſit*" (G). 5. Com. Dig. "Pleader" (2. G. 11.) 1. Bac. Abr. 180. 4. Bac. Abr. 88. 2. Term Rep. 483.

INDEBITATUS ASSUMPSIT for forty pounds for worl and *quantum meruit* for the ſame. The defendant plead there being mutual dealings between the plaintiff and hin came to an account; and that it did appear on the accoun the defendant was in arrear to the plaintiff but five pounds, he promiſed to pay him; in conſideration whereof the plain diſcharge him of the ſaid debt and claim: to this plea there demurrer.

IT WAS NOW ARGUED *for the defendant*, that a promiſe it is broke, may be diſcharged by another promiſe; and a *Trinity Term*, in the twenty-ſecond year of *Charles the* was relied upon, and it was this: A man ſold a horſe to for twenty pounds, and there is other dealing between the upon reckoning together it was agreed between them, that ſold the horſe owed to the other five ſhillings and no more; debt brought for the horſe this ſpecial matter was pleade held a good bar. *Vide* 1. *Mod.* 205, 206. 2. *Mod.* 44. many caſes elſe one may confeſs and avoid the cauſe of acti elſe plead generally, and give it in evidence; as in Maint one may confeſs and avoid it, by ſaying he was a Counſel and did it for his fee; 21. *Edw.* 3. 17. and yet this wc good in evidence upon a Not guilty. 3. *Cro.* 900. To an for a malicious proſecution, probable cauſe of ſuſpicion is plea, though it may be given in evidence upon not guilty 2. *Cro.* 130. *Br. Maintenance*, 16. 10. *Co.* 88. 9 *Hen.* That one may plead the Maintenance was for his fee, or g Not guilty, and give it in evidence; and the diverſity was be where the fact is complicated,* and may be apt to inve jury; there, that the Court may be the better able to dir jury, the ſpecial matter may be pleaded; and here it was ſa the defendant gave colour to the plaintiff; for we agree th a cauſe of action once, but that it is now gone by the ac and formerly the ſpecial matter uſed to be pleaded in trov held well; as that the goods were bought in *market overt*, v the property was allowed once to have been in the plaintiff

HOLT, *Chief Juſtice*. It is true, that a promiſe, befo broke, may be diſcharged by a parol agreement, but aft broke it cannot be diſcharged, without deed, by any new ment, without ſatisfaction; as by accord with ſatisfaction releaſe in writing; and it is likewiſe true, that ſale in *mark* is a good plea in trover. But if one bind himſelf in a b the payment of twenty pounds to *A.* by a day certain; and

of the obligor of the value of twenty pounds before the
id then they two account together, and twenty pounds is
agreed for the horſe, in an action brought upon the bond
not plead the general iſſue; yet he may plead *ſolvit ad diem*;
uſt not plead it by way of account, but it muſt be pleaded
ng to the operation it has in law, and that is to be a pay-
and ſo here. As if tenant for life grant his eſtate to him
rſion, it is a ſurrender, and muſt be pleaded as ſuch, and not
of grant; ſo here to plead this by way of account, when
ration in law is payment, will be ill. And PER IPSUM,
: be two dealers, and without coming to an account, they
o be clear againſt one another, it would not be well, with-
ning to an account; and the caſe quoted out of the *Moderns*
e firſt of this kind, and by my conſent ſhall be the laſt.
plead it as an account is but argumentative of *payment*,
is direct, and therefore not to be allowed; nor need this be
for cauſe of the demurrer. And this is nothing like debt
ſimple contract, to which it is a good plea, that the defend-
given his bond for that debt, and that the plaintiff did ac-
in ſatisfaction (*a*); or where upon a general iſſue that
may be given in evidence; for the bond is no payment of
ginal debt, but a thing of a higher nature, which extin-
it.

PER CURIAM, Judgment for the plaintiff (*b*).

MAY *againſt* KING.

nte, 86. 406.

d ſee the caſe of Rolls *v.* Barnes, Rep. 65. where it is ſaid to have l by the Court on the authority ey *v.* Evans in *Hilary*, 29. *Geo.*

2. that *inſimul computaſſent* is not a good plea in bar to an action on *aſſumpſit*; for though true, it does not extinguiſh the original promiſe.

* [539]

* Ball *againſt* Smith.

Caſe 899.

T UPON A BOND, and no ſuch perſon as the plaintiff in ing pleaded; *reſpond. ouſter* awarded; for after attorney nd entered on record, the defendant cannot plead ſuch a ſuch perſon as the

After attorney made and entered on record, cannot plead there was no plaintiff.

Baber *againſt* Palmer.

Caſe 900.

T UPON A BOND, and the ſtatute of Compoſition of two rds in number and value pleaded; and to that a demurrer, given over; ſince which day the defendant pleaded, that *laſt continuance* the plaintiff did by his deed grant and and with the defendant, to accept a bond for the building iſe in ſatisfaction of the firſt bond.

Covenant to take a bond in diſcharge of a bond, is not a good plea to debt on a bond, for it is not a releaſe.

NOW IT WAS HELD not to be a good plea, for it amounts ore than *a covenant*, and not to *a releaſe*.

Pleading the plea *puis darrein continuance* is a relinquiſhing the former plea.

IT WAS ALSO HELD, that pleading that plea, *puis darrein continuance*, was a relinquiſhing of the former plea, to which the demurrer was, contrary to *Hob.* 81. which was quoted.

S. C. 1. Ld. Ray. 693. S. C. Salk. 176.

And HOLT, *Chief Juſtice*, ſaid, that a bond may be a ſatisfaction of the condition of another bond, before it is forfeited; *ſecus* after.

If part of the money be paid *puis darrein continuance* and acquittance, whether to be pleaded in bar or abatement. Poſtea, 541.

AND HERE IT WAS DEBATED, whether, if part of the money had been paid *puis darrein continuance*, and an acquittance given for it, whether it ought to be pleaded *in bar* or *in abatement*; and *Style*, 112. where it was pleaded in abatement, was quoted; and *Allen*, 65. bad without acquittance; and there held, if one has acquittance in hand, he may plead in bar or abatement, at election.

Cro. Jac. 82. 261. 2. Vent. 58. Cliſt. 630. 1. Com. Dig. "Abatement" (I. 24.)

To which HOLT, *Chief Juſtice*, ſaid, that as he remembered, but that he ſpoke upon an old memory, that when ſuch receipt of part was pleaded in bar, it was no plea, that is, no plea to bar the whole debt or action, but only for ſo much as was received: as ſuppoſe debt be for forty pounds, whereof twenty pounds is paid before the action brought, and that payment and acquittance pleaded in bar, it is good for ſo much only, in bar. And the law will be the ſame where the payment is after the action brought; for why ſhall it not be a bar for ſo much as well when it is paid after the action brought as before? for its being paid after the action brought does not falſify the writ more than its being paid before; for in both caſes it * equally falſifies the writ; and in both caſes you may demand judgment *ſi actio* of the twenty pounds which you paid, and for which you have an acquittance. And the matter of the plea remains *ante et pendente placito*, for acquittance and payment is a good plea in bar at any time, but it ſhall be pleaded *quoad* ſo much only, and ſo it would have been if the payment had been of part before the action brought. But *Cro.* 342. *Moor*, 598. *Co. Ent.* 159. Debt upon bond for forty pounds, and pleaded in abatement, that pending the action the plaintiff had attached the defendant's money in *London*, and recovered it there; and the Court held in that caſe, that ſuch receipt of part ought to be pleaded in bar *pro tanto*; but if it were a diſcharge by the act of the party, it ought to be only in abatement, that is when the payment is after the action brought; and that there is no diverſity between this and a real action; for if an aſſiſe be brought for twenty acres, and afterwards an entry is made into one of them, it ſhall abate the writ.

* [540]

But HOLT, *Chief Juſtice*, ſaid, that was where the entry was by one without the conſent of the other; but have you ever known it pleaded in abatement where both parties did conſent? as when the entry was by virtue of a conveyance made by the tenant to the demandant.

But

But PER CURIAM, It was adjudged for the plaintiff here upon the firſt point, and no reſolution on the other point, *viz.* whether it ſhould be in bar or in abatement (*a*). BARER *againſt* PALMER.

(*a*) In debt on bond, payment of part and acquittance *puis darrein continuance* can only be pleaded in bar, Peirce *v.* Paxton, 1. Ld. Ray. 691. S. C. 2. Salk. 519. S. C. poſt. 541.

Anonymous. Caſe 901.

HOLT, *Chief Juſtice.* If at one ſitting one loſes above fifty pounds to one, and ſo to another, he muſt pay it, for they are ſeveral contracts. So if one of them play with falſe dice, and the other with fair ones, he that plays with the fair dice ſhall recover his winnings.

Gaming. Ante, 258. 2. Mod. 54. 5. Mod. 6. Lut. 180. 1 Salk. 345. 1. Sid. 394. 2. Black. Rep. 706 1226.

Birch *againſt* Bellamy. Caſe 902.

PER CURIAM. A tenant for years now cannot aſſign over his term without writing; but the aſſignment may be pleaded without ſaying it was by deed (*a*). If a thing might have been done at common law without writing, and an act of parliament comes and ſays it ſhall not be good without writing, that ſhall not alter the manner of pleading, but the pleading ſhall continue as before; and its being in writing ſhall come in evidence; but if a thing be made good originally by act of parliament, there you muſt plead all the circumſtances of the act; as upon the ſtatute of 2. *Hen.* 8. c. 1. of Wills, * you muſt ſet out that the will was in writing, and ſo plead it.

A *term* cannot now be aſſigned without deed, but need not be ſaid ſo in pleading, but to come in evidence. Plowd. Com. 432. Ray. 450. 1 Sid. 142. 1. Lev. 81. Bull. N. P. 279.

(*a*) See Villan *v.* Handley, 2. Wilſ. 49.

* [541]

Redmond *againſt* Joſeph. Caſe 903.

DEBT UPON A JUDGMENT: The defendant pleads in bar, that a *capias ad ſatisfaciendum* was taken out againſt him at ſuch a time, by virtue whereof he was taken in execution; and that the ſaid *capias* was returned on record, but did not aver that the execution continued, or that the debt was paid; and on demurrer,

To debt on a judgment, A PLEA that the defendant was taken in execution is good, without averring that the execution continued.

HOLT, *Chief Juſtice.* If he was once in execution, it muſt be intended he continues ſo, if he has not paid the money (*a*); for if he is eſcaped, you ſhould reply that of your ſide that are plaintiffs, for this is a plea in bar, and good to common intent. And he noted two caſes, where he had known eſcape replied to ſuch a plea; and a taking in execution is a bar to all other remedies while it laſts, and we cannot intend an eſcape. And here if he had averred the continuance in execution, if they cannot traverſe it on the plaintiff's ſide, what does his averment of it avail them?

Sid. 236. 7. Mod. 62.

(*a*) See the caſes of Vigors *v.* Aldrich, 4. Burr. 2483. and Jaques *v.* Withey, 1. Term Rep. 557.

REDMOND *againſt* JOSEPH.

and if he be not in execution, but eſcaped, they may reply it. And the writ iſſued out is not of record till it be returned, though the execution be good before any return.

Caſe 904. Brown *againſt* Gullock.

In debt on a bond for foreign money, muſt declare of ſo much *Engliſh* value. Ante, 81.

IN DEBT upon a bond for four hundred godies, *Eaſt India* money, the plaintiff declared for one hundred and eighty pounds; and it was objected, that they ought to make their declaration according to their lien.

HOLT, *Chief Juſtice.* They muſt demand *Engliſh* money, and not foreign money, and they are to value it according to the value it bears here in *England*; but if a man will bring an action for foreign money, it muſt be detinue.

Caſe 905. Pierce *againſt* Packſton.

On debt on a bond, receipt of part of the money *puis darrein continuance* pleaded in bar, good.

* [542]

S. C. 2. Salk. 519.
S. C. 3. Ld. Ray. 691.
S. C. Holt, 560.
Ante, 539.

DEBT UPON BOND: The defendant pleads payment of part *puis darrein continuance*, which the plaintiff accepted, in bar.

HOLT, *Chief Juſtice.* The defendant could not have pleaded it in abatement, but muſt have done it in bar; and whenever a thing, which in its nature is a bar, happens, and is pleaded * *puis darrein continuance*, it admits of no anſwer; and this he ſaid was not like the caſe of foreign attachment, though that has been held to be matter of payment, and therefore a good plea in bar; nor like the caſe of the demandant's entry into part of the land, *puis darrein continuance*, for that is the party's own act only. And he quoted the caſe of 3. *Hen.* 7. 3. *b.* 5. *Hen.* 7. 41. *a.* The firſt was debt upon contract, and receipt of part *puis darrein continuance* was pleaded; and there it was held to be no good plea, becauſe it might be given in evidence; but if it had been upon debt upon a ſpecialty, it muſt have been pleaded in bar. *Vide* 17. *Edw.* 4. 22. *Edw.* 41.

Aliter on contract, for might be given in evidence.

Caſe 906. The King *againſt* Fuller.

Indictment for procuring an attorney to be preſſed to ſea.

FULLER being convicted upon an indictment for procuring an attorney of the court, who married his ſiſter, to be preſſed to ſea, was fined one hundred marks.

Caſe 907. The King *againſt* Yates.

Outlawry reverſed, not appearing where the court was held.

AN OUTLAWRY for *high treaſon* was reverſed, upon the exception, that it did not appear where the firſt court was held.

4. Burr. 2564. 4. Hawk P. C. page 189.

Fitzg.

Fitter *againſt* Veal.

Case 908.

If, after recovering damages in an action of aſſault, battery, and wounding, the plaintiff is put to great expence, in conſequence of the injury he received, yet he cannot bring a ſecond action to recover further compenſation for the conſequential damage he ſuſtains; for it ſhall be intended that the jury conſidered all poſſible conſequences on the trial of the firſt action.

* [543]

S.C. 1. Salk. 11. S. C. 1. Ld. Ray. 339. 692. S. C. Holt, 12. Cro. Jac. 373. 4. Co. 43. 1. Leon. 319. 2. Stra. 977.

[was a ſpecial action of treſpaſs, in which the plaintiff declared of a battery and wounding of him at ſuch a time, for ich he brought treſpaſs, and recovered damages for the beating l wounding; but that ſince that time, by reaſon of the wound-, he was fain to be trepanned, and have a bone taken out of ſkull, ſo that he thereby became maimed; and the former re-ery being pleaded in bar,

[HE QUESTION was, If this action did now lie?

SIR B. SHOWER urged that it did, for that nothing was reco-ed for the maim before, for it was not known or in being at time of the former recovery; and the queſtion is, Whether an ion will not lie for a conſequential damage that happens to from the wrong of another, ſubſequently to a recovery for original wrong? And ſurely it is * hard it ſhould not; for the ong done by the ſtranger, and the damages ariſing thereby to me, the ground of the action. And if a man does in time ſubſequent fer by the wrongful act of a ſtranger, he ought to have remedy it; and we are here ſufferers by this battery in a new and higher ree, and this ſince the recovery; therefore we have received ſatisfaction for it, becauſe the jury could not have it under ir conſideration, being not then diſcovered. If this one act been to the damage of two, both of them ſhould recover re-ation with reſpect to their ſeveral damages, though it be but entire act. *Ergo*, If one act of mine will prejudice another ce, or in ſeveral degrees, there ought to be ſeveral repara-s, more eſpecially when one of the ſpecies or degrees of the age is not known till after a recovery for the other; and r recovery for this treſpaſs, if the plaintiff had died within year, the defendant would be puniſhable by indictment at ſuit the king, or on appeal at ſuit of his wife or heir. And he , if *A.* entered into my ground, and breaks down my wall ch keeps out the ſea; and I bring treſpaſs, and recover da-es, and I rebuild my wall, but by reaſon of the newneſs eof it is broke down by a new ſtorm, which the old wall ld have reſiſted; ſhall I not recover new damages for that ?

URIA. This is a new caſe, and none to be found that we know it; for every man that recovers damages, it is ſuppoſed he has ived according to the damage that he has received. If the ntiff's ſurgeon had come at the laſt trial, and ſhewed that the ntiff was not cured, the jury would have conſidered that mat-; and then was his time to conſider of the heinouſneſs of the ery, and to give evidence of it. And in this caſe the *gift* of action is the injury, or firſt battery; and the wounding and ming is but aggravation of that injury: but in ſome caſes the age is the ground of the action, as where a maſter brings

action

FITTER *againſt* YEAL.

action for beating his ſervant, whereby he loſes his ſervice. And it ſhall be intended here that the jury gave entire ſatisfaction for the battery. And as to the caſe put of the ſea-bank, the plaintiff ſhall recover damages for the overflowing of his lands, and to rebuild his wall; and the danger of the new wall, if there be any thing in that too, may be conſidered; but this muſt be all at once. And though there be nothing of maim in the firſt declaration, yet a recovery in treſpaſs and battery is a good bar * in maim. 4. *Co.* 43. *a.* In criminal matters one may be twice puniſhed for the ſame offence; for if indictment be for aſſault and battery, and the party is convicted and fined, yet the plaintiff may have treſpaſs, and recover damages againſt him; and if afterwards, within the year, the party die, the other may be hanged for the murder.

[544]

But *per* HOLT, *Chief Juſtice*, If a man be dangerouſly ill of a battery, and is indicted for it, the indictment for the battery ought not to be tried till after the year. And if *A.* wound *B.* and he thereof die within the year through the unſkilfulneſs of ſurgeons, yet it is felony in *A.* And if *A.* bring an action for words actionable in themſelves, and recover damages, and afterwards, by reaſon of the words, ſhe loſe a huſband, yet no action will lie afterwards for the ſpecial damage: and ſo if the words be actionable for the ſpecial damage which party has ſuffered by reaſon of them, and for and that damages are recovered, and after the party has another ſpecial damage.

AND THEY ALL HELD, that this is not like the caſe put, where *a tort* is done to two by one act, for there a recovery by one is not for the *tort* done to the other; and upon declaration for aſſault, battery, and wounding, one may give maim in evidence, and recover damages for it; and therefore a recovery in ſuch an action is a good bar to an action for maim. And this is not like the caſe of a nuiſance in erecting a penthouſe, whereby the rain falls upon my houſe or garden; or ſtopping my lights, wherein I ſhall recover damages for every new hurt *in infinitum*: for, firſt, the battery is a tranſitory act, and the nuiſance is a continued one as long as it laſts; therefore damages cannot be recovered for it at once: ſecondly, every new rain that falls, or every light that is ſtopt, is a new nuiſance; but every new ill conſequence of the battery is not any new wrong of the defendant.

Caſes T. H. 55.

Et PER TOTAM CURIAM, Judgment was given for the defendant.

Caſe 909.

The King *againſt* Young.

Before outlawry for murder can be reverſed, a *ſcire facias* muſt go to all the lords, or Attorney General muſt on record confeſs there are no lands.

YOUNG was outlawed for *murder*, and brought a writ of error; and being brought to the bar, was aſked what he could ſay why execution ſhould not be awarded againſt him; and pre-

ſented

a writ of error upon his knees, and aſſigned for error, that not appear that the county courts, at which the proclama- were, were holden for that county (*a*).

* [545]

OLT, *Chief Juſtice.* You muſt bring a *ſcire facias* againſt e lords mediate and immediate, or MR. ATTORNEY muſt into court and confeſs on record that you have no lands or ents; though he ſaid he had known outlawries reverſed with- ich *ſcire facias*, but that was a dangerous courſe for the mediate and immediate, who, though when they are ſum- l by ſuch *ſcire facias*, could not plead *in nullo eſt erratum*, ar the reverſal of the judgment, yet may plead releaſes or evied to them by the outlawed perſon after the outlawry, in reſtitution; but ſince they cannot maintain the judg- ſuch *ſcire facias* ſeems rather of caution than of ne- (*b*).

Poſtea Mich. 13. W. 3. Dominus Rex v. Young.

1. Jo. 421.

l after reverſal of the outlawry in this caſe, upon THE AT- EY GENERAL'S confeſſion of "no lands," the defen- as committed to *Newgate*, to undergo his trial the next s.

lex v. Yates, ante, 542. (*b*) See 4. Hawk. P. C. ch. 50. ſ. 14.

Wilbraham *againſt* Doley.

Caſe 910.

rror to reverſe an outlawry for error in law, the queſtion ; Whether the plaintiff muſt give bail to the original ac- s he muſt do when it is to be reverſed for want of procla- s upon the ſtatute of 31. *Eliz.* c. 3.?

In error to reverſe outlawry for error in law, bail need not be given to the original action, as it muſt be for want of proclamations.

GOULD, *Juſtice*, cited a caſe out of *Littleton's Reports*, he was held to bail upon an error in law, the original cauſe on being ſuch as required ſpecial bail.

per HOLT, *Chief Juſtice*, They ought not to be holden upon any error in law, for the ſtatute of *Eliz.* men- nly want of proclamations; and your caſe out of *Lit- Reports* is bunglingly reported. And they all ſaid, if it pear to them that there was a want of proclamation in the ry, and an error in law beſides, though the party aſſigned or in law only, yet they would reverſe it for the want of nation, and ſo hold him to bail; but if there were not want clamation, but merely an error in law, there need be no or as the ſtatute made a new error for the advantage of the ed perſon, ſo it thought to recompenſe that with another creditor, that in that caſe he ſhould have good bail to his ; but however they directed the party outlawed to put in anſwer the condemnation, or render his body.

S.C. 2. Ld. Ray. 591. 605. S.C. 2. Salk. 500.

NOTE,

Special bail to reverſe outlawry, is to anſwer condemnation; other ſpecial bail is to anſwer condemnation, or render body to priſon.

NOTE: *Per* HOLT, *Chief Juſtice*, Special bail to re outlawry muſt be ſimply to anſwer the condemnatio other ſpecial bail * is to anſwer condemnation, or render hi and it was agreed, if the party were taken up upon the *ca gat.* he muſt give bail to reverſe the outlawry; and they ſaid, the ſheriff was fineable for leaving ſuch errors lawries.

* [546]

Caſe 911.

Anonymous.

Juſtices of peace of the county may do what juſtices of the diviſion are appointed to do by act of parliament.

HOLT, *Chief Juſtice.* Where an act of parliam juſtices of peace of ſuch a diviſion ſhall do ſo and only directory *quoad* the diviſion; and any of the juſtice county may do it.

Caſe 912.

Anonymous.

Vill is a conſtabulary.

HOLT, *Chief Juſtice.* A vill and a village are the ſa a hamlet is a diviſion of a vill. 18. *Edw.* 1. The vill is a conſtabulary, and a hamlet is commonly a tithing.

Caſe 913.

Pratt *againſt* Rutleis.

On an avowry in replevin of a diſtreſs for rent, if the plaintiff be nonſuited, and, on a *retorno habendo* awarded, a *writ of enquiry* of damages be iſſued; a writ of *ſecond deliverance* iſſued before execution of the writ of enquiry is *a ſuperſedeas* of the *retorno habendo*, but not of the *writ of enquiry* S. C. Salk. 95 Gedb. 185. Barnes, 427.

DISTRESS for rent, replevin, and avowry, and the in replevin nonſuited, a *retorno habenda* awarded, and of enquiry of damages iſſued out, and before execution *a deliverance.*

The doubt was, Whether this *ſecond deliverance* be *a ſup* of the *writ of enquiry (a)?*

And that it was, was urged, that the writ of enquiry is gr upon the *retorno habendo*, and the *ſecond deliverance* is a *deas* of that, and by conſequence of the *writ of enquiry*; ſo ſuperſedes the judgment ought to ſuperſede that which is gr upon the judgment *(b)*. The plaintiff in replevin has ſtreſs delivered to him upon the *ſecond deliverance*; and if judgment thereon, how ſhall the avowant make up his re the enquiry? And this difference was taken between the tiff in replevin's being nonſuited, and judgment's being him upon *nihil dicit*; for a judgment upon a *nihil dicit* is bar, and no *ſecond deliverance* will ever lie after; but after one may have a *ſecond deliverance*, and this *ſecond deliver* given by the ſtatute of *Weſtminſter the Second*, c. 2. in li ſecond replevin; for at common law, if the plaintiff in r had been nonſuited, he could have a new replevin *toties* but that ſtatute in lieu thereof gives a *ſecond deli*

(*a*) See the ſtatute, 17 *Car.* 2. c 7. "Deliverance," and 2. Inſt. 3
(*b*) See Brooke's Abrid. title "Second

h is a judicial writ of the Court where the replevin was be-
brought, and if he is nonſuited in that, he is gone. But ſince
ſtatute of * *Weſtminſter the Second*, the ſtatute of 21. *Hen.* * [547]
19. gives damages to the avowant upon a nonſuit of the
tiff in replevin, as well as upon any other judgment in reple-
and therefore it ſhould ſeem, if the *ſecond deliverance* be
a *ſuperſedeas* of the *retorno habendo* and writ of enquiry,
atute's giving damages would be of no avail.

IT *it was anſwered to that*, that being ſo would by no means
:r the ſtatute ineffectual as to the damages; for if judgment be
he awowant upon the *ſecond deliverance*, he ſhall have the
ges of the nonſuit included therein: and all the ſaid learning
)levin at common law, and of the ſecond deliverance by the
:e of *Weſtminſter the Second*, was agreed to by all. 2. *Inſt.*
341. *Dy.* 41. *b.* and likewiſe that 21. *Hen.* 8. c. 19. gives
ges upon a nonſuit in replevin (*a*).

It it was ſtrongly urged the writ of enquiry was ſuperſeded
is caſe by the *ſecond deliverance*, which, AS WAS AGREED,
ſedes the *retorno habendo*; and this caſe was put as parallel with
By the ſtatute of *Weſtminſter the Second*, c. 5. damages are
in a *quare impedit*, yet if a *quare impedit* be brought againſt
on and his clerk, and they both plead the ſame plea in bar,
he patron dies, and the plea be found for the incumbent,
ll have no damages, becauſe we can have no judgment: ſo
he judgment for a return being ſuperſeded, there can be no
ges.

ıtra were quoted *Palm.* 403. *Latch*, 72. that the *ſecond de-*
ınce is no *ſuperſedeas*, for otherwiſe that ſtatute of 21. *Hen.*
19. would ſignify little.

LT, *Chief Juſtice.* The damages are not given by this
e of 21. *Hen.* 8. c. 19. for getting the thing avowed for
the avowant, but for the vexation in bringing a replevin
ut cauſe; and the nonſuit is ſufficient evidence that there
o cauſe of replevin, at leaſt it is evidence of a vexation; and
avowant cannot maintain his avowry, the plaintiff ſhall re-
damages for the diſtreſs. If a man bring an action, and is
ited, the defendant ſhall recover damages for the nonſuit;
the plaintiff bring a new action, and recover, he ſhall re-
damages, but ſhall have nothing for the coſts of the non-
and if *ſecond deliverance* be brought before *retorno habendo*
ed, it ſhall ſuperſede the execution; if after it is executed, it
otwithſtanding fetch back the diſtreſs.

ere quid inde venit (b).

Bro. Ab. "Second Deliverance." den, 266.

: is ſaid, ſame caſe, 1. Salk. 95. Court was of opinion that this is *Fees* to the *retorno habendo*, but not to the *writ of enquiry*: and ſee Waterman *v.* Yea, 2. Wilſ. 41. Cooper *v.* Sherbroke, 2. Wilſ. 116. Barker *v.* Lade, Carth. 253. Godb. 185. Barnes, 427. Bull. N P. 58.

Anonymous.

Caſe 914.

* Anonymous.

If order of juſtices be quaſhed, order of ſeſſions falls of courſe.

PER CURIAM. If the order of two juſtices be quaſhed here above, an order of ſeſſions confirming that order falls of courſe; for the juſtices at the ſeſſions have not power to make an original order.

Caſe 915.

Anonymous.

Order of juſtices confirmed on appeal is final to the appellants.

PER CURIAM. If an order of juſtices for the removal of a poor perſon be confirmed on appeal, the appellants are ever concluded from diſcharging themſelves of that poor perſon, as to all places; for if another pariſh than that from whence he is ſent to them by the two juſtices, be the laſt place of his legal ſettlement, they may ſend him thither by an order of two juſtices to be made for that purpoſe; or upon appeal, another place's being the place of his laſt legal ſettlement, may be given in evidence at the ſeſſions upon the appeal (*a*).

AND NOTE: One cannot be removed to an extraparochial place (*b*).

(*a*) See Harrow *v.* Ruiſlip, 2. Salk. 524. Mynton *v.* Stoney Stratford, Salk. 527. Swanſcomb *v.* Shensfield, 2. Salk. 472. Cirenceſter *v.* Coln St. Aldwins, Burr. S. C. 17. and Mr. Conſt's edit. of Bott's P. L. 2. vol. 807 to 819.

(*b*) But ſee Rex *v.* Rufford, Stra. 571. 8. Mod. 39. Rex *v.* Welbeck, 2. Stra. 1143. 1. Conſt, 24. Rex *v.* Bedfordſhire, Cald. 167. Rex *v.* Peterborough, Cald. 238. Rex *v.* Ronton Abbey, 2 Term Rep. 207. and 1. Conſt, 66 to 74.

Caſe 916.

Lacy *againſt* Kynaſton.

Indenture made by *A.* and *B.* "to ſave *C.* "harmleſs," is not a *defeaſance* of a covenant wherein *A.* is bound to pay *C.* a ſum of money. S. C. ante, 221. 415. S. C 1. Ld. Ray. 419. 688. S. C. Salk. 573. 575. S C. 3 Salk. 298. S.C. Holt, 178. 218.

COVENANT by the wife of *Thomas Lacy*, as adminiſtratrix to her huſband, againſt the defendant, upon an indenture bearing date the firſt of *May* 1676, made between *Thomas Killigrew*, *Eſq.* and others, of one part, and the plaintiff's inteſtate of the other part; reciting, that ſeveral articles had been made between the ſaid parties, in all to the number of four; and that "it was covenanted and agreed between the ſaid parties, "that from thenceforth all the ſaid articles ſhould be void; and "that thereupon *Killigrew* and *Kynaſton*, and the reſt, did jointly and ſeverally covenant and agree to and with the plaintiff's "inteſtate, that if he at any time ſhould be minded to give over, "and deſiſt acting in the company of comedians of his Majeſty's "THEATRE ROYAL, and would give notice of ſuch his intent "within ſix months before, he ſhould have ſix ſhillings and three "pence for his ſhare every acting day, and alſo one hundred "pounds to his executor or adminiſtrator, within three months "after his death; and if he died without deſiſting to act, and no-"tice as aforeſaid, that then the ſum of one hundred pounds "ſhould

uld be paid to his executor or adminiſtrator within three nths after his death :" and averred that all his life he con- l in the Company, and died in it.

d for the one hundred pounds this action was brought, it not paid within the time after his death.

Ipon *oyer* of this deed ſeveral articles are ſet out; and the de- * [549]
it pleads in bar of the action, that after the ſealing and de- of the deed mentioned in the declaration, *viz.* the firſt, of th of *May* 1676, there was another indenture made be- the plaintiff's inteſtate and the other parties before- oned, of one part, and the defendant of the other part, with me recital as in the deed in the declaration, and the articles and covenants. But that which is relied upon at it is therein agreed by *Killigrew*, the plaintiff's in- , and others jointly and ſeverally, to and with the de- it, " that if the defendant *Kynaſton* ſhould give notice is intent to give over acting in the ſaid Companies three ths before-hand, he ſhould have an allowance of ſix ſhillings three-pence a day every acting-day, as above, and one dred pounds ſhould be paid to his executor or adminiſtrator, caſe he died without any ſuch notice;" and that it was HER COVENANTED, " that if the defendant *Kynaſton* ſhould any ſuch notice, he ſhould be free and diſcharged of and all debts, duties, ſums of money, or any other ſecurity red into, or thing by him taken up for the uſe of the Com- y;" AND THAT " the ſaid *Killigrew*, *Lacy*, the plaintiff's ſtate, and the reſt, ſhould from time to time after ſuch no- ſave harmleſs and indemnify the defendant *Kynaſton*, his exe- rs and adminiſtrators, from all ſuch debts, ſum and ſums of ey, and from all ſecurities entered into for that purpoſe e, or together with the reſt of the Company, or any of , for any matter or thing relating to the Company ;" AND " they ſhould not admit any into the ſaid Company, to have benefit thereof, without ſuch perſon entered into the above- agreement." IT WAS FURTHER AGREED, " that the ſix ſhillings and three-pence as aforeſaid, and the ſaid one red pounds, by the true intent and meaning of the ſaid ment, ſhould be in full ſatisfaction of all the reſpective par- intereſt in the cloaths, books, ſcenes, &c. of the ſaid Com- , and that the Company ſhould have them in conſideration of."

plaintiff's inteſtate died firſt, but the defendant inſiſts upon e gave off acting ſuch a time, and thereof gave notice ſix before, and is not one of THE COMPANY, and ſo prays nt of this indenture; and to this plea there is a de-

The

The queſtion is, Whether by the indenture made by the plaintiff's inteſtate, together with *Killigrew* and the reſt of the Company, with the defendant, to ſave him harmleſs, &c. be a defeaſance or diſcharge of the covenant wherein * *Kynaſton* is bound to pay the plaintiff one hundred pounds after his inteſtate's death?

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And WE ARE ALL OF OPINION, that it is not a defeaſance though the defendant gave off acting, and thereof gave notice according to the covenant; but that it is only a covenant, and to be uſed as ſuch, and that for theſe three reaſons.

defeaſance one of the ies, it is to

FIRST, It is a covenant made by the plaintiff's inteſtate, *Killigrew* and the reſt, with the defendant *Kynaſton*, to ſave harmleſs from all covenants entered into by him upon account of the Company; and this muſt be a covenant, and conſtrued as ſuch, becauſe it is in conjunction with others jointly and ſeverally, and can be no more than a covenant by them all. And though ſuch an indenture may be between the other parties to this deed and *Kynaſton*, as here is between the plaintiff's inteſtate and him, yet that does not appear to us. Now, then, if we ſhould conſtrue this deed, as to the plaintiff's inteſtate, as a defeaſance, we would make it void as to the others; for if it be a defeaſance as to one of the parties, it can be of no purpoſe as to the others, and then the whole is *ipſo facto* void, upon the performance of that which makes the defeaſance, and need have no other operation; and ſuch conſtruction would alter the frame of the agreement, and make the covenant of the others void.

Where deed intends mutual remedies, not to be conſtrued a defeaſance.

SECONDLY, It is moſt apparent from the frame of the deed, that this is a bare covenant, and no more. The intent of the deed was, that the parties were to truſt one another upon the mutual agreement, and that that deed ſhould have no other operation than to give them mutual remedies; for there is care taken that there ſhould be a ſaving harmleſs from all manner of incumbrances that *Kynaſton* was engaged in ſolely or jointly upon account of the Company. Now there are other matters where this clauſe muſt operate by agreement only, and ſo cannot be a defeaſance; and if it were in expreſs terms ſaid, that the defendant ſhould be ſaved harmleſs from this very payment, as well as from the reſt; yet the intent was, that he ſhould truſt to his agreement, and rely thereupon, and not to vacate or diſcharge an agreement before, but have his action of covenant in caſe of any charge upon him.

A defeaſance is, that upon the conditions performed the thing to be defeaſanced is to ceaſe.

THIRDLY, In its nature it is not a defeaſance: the nature of a defeaſance is, that upon condition performed, or upon ſuch and ſuch terms, the thing to be defeaſanced is to ceaſe; and here are no ſuch words here, therefore there want proper words of defeaſance; and if it be conſtrued a * defeaſance, it muſt be, not becauſe the words import any ſuch thing, but from the nature of the thing; and then conſider what the conſequence would be to make

* [551]

e it a defeaſance, it would be to make the plaintiff without dy. For if ſeveral covenant jointly and ſeverally, a defea- e to one of them is a defeaſance to all; and it is impoſſible feat as to one, without defeating as to all. If it were in terms, that from the death of *Kynaſton*, or his giving notice ive over, the covenant ſhould be void, as to him only; yet would diſcharge all the reſt, for it would be a releaſe as to ; and if ſo, every one of them might plead it; and where n is joint or ſeveral at the election of the party, there a e to one is a releaſe to both, for the other may plead it to againſt him upon the bond, &c. *Vide Co. Lit.*—And if a de- ice works a releaſe and diſcharge, a defeaſance to one is a ſance to all, as a releaſe to one is a releaſe to all; but a caſe lly in point is 34 *Hen.* 8. *Br. Eſtranger al fait* 31. The was, Whether a defeaſance of a bond could be good to a ſtran- o the bond; as if *A* be bound to *B.* in a certain ſum, l. covenants and grants with *C.* a ſtranger to the bond, that did ſuch a thing the obligation ſhould be void, and held that ld not be a good defeaſance; but if *A.* and *B.* be bound to d *C.* agrees with *A.* that upon doing ſuch a thing the obliga- hall be void, that will be a good defeaſance to *B.* becauſe a rge to one is ſo to the other. Now, to conſtrue this cove- a defeaſance would deſtroy the whole agreement. And to ſuch a conſtruction as would deſtroy a man's ſecurity, and him of his covenant and agreement that he had made and red for his ſafety, would be a very injurious one.

A defeaſance to one is a defeaſance to all.

is objected, that a *perpetual covenant* amounts to *a re-*

SWER. A perpetual and abſolute covenant, for example, obligor, that the obligee would never ſue upon the obliga- is a releaſe; or if it be with condition never to ſue, it will defeaſance, though there be no words not to ſue in the obli- n, but only in the condition of it; and the reaſon of this is oid a circuity of action; becauſe there one ſhould preciſely er the ſame damage that he had ſuffered by the other's ſu- he bond. *A.* is bound to *B.* and *B.* covenants never to put nd in ſuit againſt *A.*; if afterwards *B.* will ſue *A.* on the bond, y plead the covenant by way of releaſe. But if *A.* and *B.* be and ſeverally bound to *C.* in a ſum certain, and *C.* cove- with *A.* not to ſue him, that ſhall not be a releaſe, but a ant only; becauſe he covenants only not to ſue *A.* but does venant not to ſue *B.* for the covenant is not a releaſe in its , but only by conſtruction to avoid circuity of action; for he covenants not to ſue one, he ſtill has a remedy, and then l be conſtrued as a covenant, and no more. 48. *Aſſ. pl.* 44. n made a feoffment in fee with warranty againſt all per- Feoffee by his covenant grants and agrees not to take age of this warranty, and then he is impleaded, and vouches ſor, he may plead this covenant in bar of the warranty; e the feoffee has bound himſelf thereby not to take advan-

A covenant that the obligee would never ſue is a releaſe.

Hard. 113. 21. *Hen.* 23, 24. Vid. 3. Lev. 42. 1. Inſt. 126. *b.*

* [552]

If *A.* and *B.* be jointly and ſeverally bound to *C.* and *C.* covenants not to ſue *A.* it is not a defeaſance. Vide 1. Inſt. 146. b. 267.

LACY *againſt* KYNASTON.

tage of the warranty; but if the covenant had been not to bring a *warrantia chartæ*, or not to vouch, then it had been a covenant only, and the covenantor hath other remedy and uſe left him of his warranty; and the covenant would not be a releaſe in that caſe, becauſe it does not exclude all his remedy upon the warranty. So then, if two be jointly and ſeverally bound, and the obligee covenants with one of them not to ſue him, yet he may ſue the other, becauſe he might without his covenant ſue one of them without the other; and therefore, there being nothing in the covenant to preclude him from that benefit, he has it ſtill left in him: and here the plaintiff's inteſtate, notwithſtanding this covenant, has remedy againſt the other covenantees; therefore *Kynaſton* cannot uſe it as a releaſe; for then it would be a releaſe to all the reſt, which would be contrary to the nature and frame of the deed. *Vide* the Caſe of *Gawden v. Draper (a)*. *A.* covenants with *B.* to pay him three hundred pounds for the uſe of the wife of *A.* only for her life; and covenant brought upon this, and breach aſſigned, that there was ſo much of the three hundred pounds arrear; defendant pleads, that there was another indenture between him and the plaintiff ſince the date or delivery of the covenant deed declared on, reciting the ſaid covenant and agreement for the payment of the three hundred pounds, wherein it was covenanted and agreed, that ſo long as *A.* and his wife did cohabit, the payment of the three hundred pounds ſhould ceaſe, and avers, that they did cohabit for the time the ſaid arrear became due, and pleads this in bar of the firſt agreement; and there are expreſs words that the payment ſhould ceaſe during the cohabitation; and there had been no great harm to conſtrue this as a releaſe of the arrearages during the cohabitation; but yet it being a ſum in groſs, and the covenant temporary and not perpetual, they held it no good bar: but he ſaid, if it had been a rent for years, and a covenant or agreement by the leſſor to leſſee, that it ſhould not be paid, or that it ſhould ceaſe for ſuch a time, that would amount to a grant of the rent for ſo long, and it would in that caſe ceaſe and revive again; but this was a ſum in groſs; and though it was defeaſible, yet becauſe it was not entirely defeaſanced, they would not allow a ſubſequent temporary agreement to be a releaſe of it.

*[553]

And ſo PER TOTAM CURIAM the plaintiff had judgment.

(a) 2. Vent. 217.

Caſe 917.

The King *againſt* Jonſon (a).

Seſſions may make original order to diſcharge apprentice. S. C. Salk. 68.

THE juſtices of peace at the ſeſſions, without any previous application to the juſtice of peace, or magiſtrate of the corporation, made an order for diſcharging an apprentice from his

S. C. 2. Salk. 491. S. C. Holt, 511. Ante, 498. Ante, 350.

(a) The ſame point was, at the ſame time, decided in the caſe of Rex *v.* Fenwick. NOTE *to original* MS. And ſee Rex *v.* Hayes, ante, 350, and Mr. Conſt's edit. of Bott's P. L. 1. vol. 512 to 516.

maſter

THE KING *againſt* JONSON.

; and likewiſe that the maſter ſhould refund ſome of the that he had received with the apprentice; and the great was, whether this order, being made at the ſeſſions without plication to a juſtice of peace, &c. was not void and *coram dice*; for it was ſaid, the ſeſſions had no juriſdiction of the , but when it came before them by way of appeal.

HOLT, *Chief Juſtice*, after great conſideration, ſaid, that ere a new thing, he would be of opinion, that the juſtices ons ought not to meddle with it at the firſt inſtance; but here have been ſo many orders made ſo by them, and that ge had ſo prevailed, he would not alter it now; and as to toring the money, he ſaid, the *(a)* order was very good in oint, for the words of the ſtatute are, "that they ſhall do t in equity they ſhall think proper."

the order was affirmed PER CURIAM.

(a) Vide ante, vol. 1. p. a.

King *againſt* The Inhabitants of the Pariſh of Aickles. Caſe 918.

Apprentice in law is not aſſignable; but if under the aſſignment he ſerves his time in another town, he gains ſettlement there.
S. C. Salk. 68. S C. Ld. Ray. 683. S. C. 1. Conſt, 521. 1. Wilſ. 96.

)Y ſet out an apprentice to a maſter in one pariſh, who by riting did aſſign and turn him over to another maſter, where ed his time in the pariſh of *A.* and the boy being now poor,

E QUESTION was, Whether he had gained a legal ſettlement ' and an order of two juſtices was for removing him to ano- wn, as not legally ſettled in *A.* becauſe an apprentice is not ble in law.

CURIAM. It is very true, an apprentice is not * aſſignable; re the boy ſerved during his apprenticeſhip in the pariſh of *A.* one maſter make a contract with another, that the other ave the ſervice of his apprentice, that is good between them- , and though the words be "grant, aſſign, and turn over," indeed cannot alter the legal intereſt of the apprentice, yet it its to an agreement that he ſhall ſerve the other during the like the caſe where one aſſigns over a bond to another, in its nature is not aſſignable over, but if he do aſſign it t is a good agreement, that the aſſignee ſhall have the money own uſe; and ſo is the caſe of *Deering v. Farringdon (a)*, one was to receive a proportion of damage from the town *mburgh*, and it was ſtipulated, that the town ſhould pay ſo to the parties that had ſuffered, one whereof aſſigned his r proportion of the reparation to another, notwithſtanding he after received the money to his own uſe; whereupon the e brought covenant againſt him, and the words of the deed only "*aſſignavit et tranſpoſuit*;" and though the thing in its

* [554]

(a) 1. Mod. 113. 3. Keb. 304.

THE KING *against* THE INHABITANTS OF THE PARISH OF AICKLES.

nature was not assignable, yet it was enough to bind to suffer the assignee to enjoy it (*a*). So here, in strict prentice is not assignable over, yet by agreement betw sters, it may be so far done, as that covenant lies for a tion of enjoyment of his service; then the apprentice such an assignment, is a good service of an apprentice fore sufficient to give him a settlement in *A.*

And the order was quashed (*b*).

(*a*) See Mouldsdale *v.* Birchall, 2. Bl. Rep. 820. and the cases there cited.
(*b*) See Rex *v.* Channel, 3. Keb. 519. Rex *v.* Banner, Stra. 48. Holy Trinity *v.* Shoreditch, 1. Stra. 1 Bridgford, 1. Burr. 133. field, 1. Const, 523. and *Geo.* 3. c. 57. s. 7.

Case 919.

Anonymous.

Writ of appeal should be returned *non inventus* before *capias* goes.

PER CURIAM. The original *writ of appeal* oug turned "*non est inventus*," before *a capias* award

Case 920.

Anonymous.

An attorney has a *lien* on paper in his hands. Skin. 1.

NOTE: The Court will not compel *an attorney* t ings, without the other party agrees to pay him hi demands.

2. Mod. Cases, 340. Stra. 621. 547. Dougl. 164. 226. 238. 2. Atk. 224. 3. Term Re

Case 921.

Anonymous.

The disposition of pews belongs to the ordinary. If one purchase a pew, his interest therein ceases by ceasing to be a parishioner.

* [555]

HOLT, *Chief Justice.* Of common right, the disposit in a church belongs to THE ORDINARY (*a*), bu is bound to repair them; and it is only reliancy that m to a pew in a parish (*b*); for if one purchase a pew there, wards leave it, his interest in the pew is gone; and if return again into the place, yet he must renew his intere a person cease to be a housekeeper in a parish, but contin the parish as a lodger, and *go to church, and is taken not parishioner, though he be but a lodger, yet his interest had in the purchased pew continues.

(*a*) Ante 40. Godb. 200. 2. Bulst. 150. 2. Lev. 241. Cro. Jac. 366. 1. Salk. 167. 3. Com. Dig. "Eglise" (G. 3.)
(*b*) But see the case o Booth, 1. Term Rep. 428. Brooks, 1. Term Rep. 431. *v.* Mathews, 5 Term Rep.

Case 922.

Anonymous.

Proceedings at former trial must be proved before evidence of what done there. Postea, p. 565.

NONE can be admitted to give evidence of what wa the former trial, without the proceedings thereat be

Ano

Anonymous.

Caſe 923.

In action for a dog's biting, muſt prove the owner knew the dog uſed to bite. Cowp. 826. Dougl. 658.

: To maintain an action for the biting of the defen- 's dog, it muſt be proved that he knew his dog to be uſed but one inſtance is ſufficient in that caſe (*a*), though to : words of the ſtatute of — *Eliz.* — concerning leaſes ıſually letten, the lands muſt have been letten twice at

n v. Banks, Cro. Car 254. Davis, Cro. Car 487 Maſon ante, 332. S.C. 1. Ld. Ray. 606. Buxenden v. Sharp, 2. Salk. 662. Jenkins v. Turner, 1. Ld. Ray. 228. Smith v. Pelah, 2. Stra. 1264.

Anonymous.

Caſe 924.

A variance between the *indictment* and *declaration* for the malicious proſecution is fatal.

for a malicious proſecution for felony, brought after ac- , it was agreed that the declaration muſt agree with the ıt ſubſtantially.

:re the indictment being for ſtealing "*unum ſintinculum*, CE, a callico quilt," and the declaration *unum ſinitun-*

.S ADJUDGED a material *variance* (*a*).

A declaration for a malicious proſecution ſtating the charge generally, is good.

e declaration having beſides laid generally, that he charg- intiff with felony before a juſtice of peace, IT WAS HELD to maintain the action (*b*).

Probable cauſe is a good defence in an action for malicious proſecution.

LIKEWISE, that it was neceſſary for defendant here to ſelony committed, and alſo a probable cauſe of ſuſpi-

Barnes v Conſtantine, Cro. uſhby v. Watſon, 2. Black. Franklyn v. Webb, Eſpi- 32. Pope v. Foſter, 4. Term

declaration muſt ſtate ſpeci- he proſecution terminated. ırrell, 1. Stra. 114. Farrell v. Nunn, Bull. N. P. 14. Fiſher v. Briſtow, Dougl. 205. Morgan v. Hughes, 2. Term Rep. 225

(*c*) See Knight v. Jermyn, Cro. Eliz. 134. Pain v. Rocheſter, Cro. Eliz. 871. Johnſton and his Wife v Browning, 6. Mod. 216. Savil v. Roberts, Salk. 15. Parrott v. Fiſhwick, Bull. N. P. 14.

MICHAELMAS TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Littleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Thomas Trevor, *Knt. Attorney Genera*
John Hawles, *Eſq. Solicitor General.*

Caſe 925.

Information for pretending himſelf to be bewitched.
S. C. 5. St. Tr. 486.
S. C. 6. St. Tr. App. 59.

* Hathaway's Caſe.

ONE *Hathaway*, a moſt notorious rogue, feigned himſel witched and deprived of his ſight, and pretended to faſted nine weeks together; and continuing, as he pre ed, under this evil influence, he was adviſed, in order to diſcov perſon ſuppoſed to have bewitched him, to boil his own wate glaſs bottle till the bottle ſhould break, and the firſt that cam the houſe after ſhould be the witch; and that if he ſcratched the of that perſon till he fetched blood, it would cure him; whi ing done, and a poor old woman coming by chance into the h ſhe was ſeized on as the witch, and obliged to ſubmit to be ſc ed till the blood came; whereupon the fellow pretended t preſent eaſe. The poor woman hereupon was indicted for w craft, and tried and acquitted at *Surrey* aſſizes before H *Chief Juſtice*, a man of no great faith in theſe things; an fellow perſiſting in his wicked contrivance, pretended ſtill ill, and the poor woman, notwithſtanding the acquittal, f by the mob to ſuffer herſelf to be ſcratched by him. And thi ing diſcovered to be all impoſition, an information was filed a him.

——— *againſt* Tracy. Caſe 926.

[OVED for leave to file an information againſt him for reſcuing a perſon from ſheriff in the *Temple*.

On reſcous returned, it is not traverſable.

But PER CURIAM, You had better get a *reſcous* returned, and ng an action upon the caſe againſt him; and the *reſcous* after ion thereof is not traverſable: and though the uſual fine * upon *ſcous* returned be only four nobles, yet ſurely that muſt be underod where the perſon reſcued is re-taken, otherwiſe the fine may higher.

* [557]

Sheriff of Cumberland's Caſe. Caſe 927.

ER CURIAM. It is the conſtant practice for ſheriffs to take bail-bonds, according to 23. *Hen.* 6. *c.* 9. from perſons taken upon *attachment* (*a*); and no remedy againſt him upon *a cepi* rned, if he has him not at the day, but to amerce him.

Sheriff takes bail-bonds on an attachment.

) See Burton *v.* Law, Stiles, 234. *v.* Ellis, 2. Black. Rep. 955. Anous, 1. Stra. 479. Feld *v.* Workhouſe, Comy. Rep. 264. Studd *v.* Acton, 1. H. Bl. Rep. 468. and Rex *v.* Daws, poſt. 579.

Sutton the Marſhal's Caſe. Caſe 928.

E had diſturbed the ſteward of the priſon, upon his coming into the office, ſuppoſing his right to have determined with eſtate of the former marſhal who put him in, and had but an te for life in the office.

Whether the ſteward of the priſon be an officer for life, not removable by the marſhal. S. C. 6. Mod. 57. 91.

t was now moved by BROTHERICK, that he might be ruled to er him quiet, alledging that his eſtate was a fee, or at leaſt for own life, and not determinable by the eſtate of the grantor; he compared it to the caſe of ſecondary of the court, who is in by *the Chief Juſtice*, yet continues in after death or other rmination of the office of Chief Juſtice.

HOLT, *Chief Juſtice*. The caſes are not parallel, for by anit cuſtom of the court it is, that an under-officer's place of court does not determine with that of Chief Juſtice who puts in. And there is a vaſt difference between an office by cuſ- only in the grant of a ſuperior officer, and an office derived of the intereſt of another; and the office of marſhal of the 's bench is an office of inheritance, and the under-offices are ved out of it; and therefore if that office, that is an inheritance, granted for life, all the under offices that are inferior to, and ved out of his eſtate, and in the gift of him that has the eſtate life, are determinable upon his eſtate; and there can be no om to the contrary, becauſe the ſuperior office being an inſtance could not ſtand in need of the ſupport of a cuſtom.

SUTTON THE MARSHAL'S CASE.

If tenant for life of the office of marſhal grant an office for life, the ſurrender of his office ſhall not defeat the eſtate of the inferior officer.

But if tenant for life of the office of marſhal grant ſuch inferior office for life, and then ſurrender, that ſurrender ſhall not alter or deſtroy the eſtate of the grantee, becauſe the grantor ſhall not by his act defeat his * grant; for that reaſon, if he forfeits his eſtate, yet the under-grantee ſhall continue in for life of the grantor: as if tenant for life make a leaſe for years, and then ſurrenders or forfeits his eſtate, yet the leaſe for years remains good during his life, if the years continue ſo long. And though the late marſhal's place be determined by parliament (*a*), yet that ſhall not affect the under-officer; for it is for the marſhal's own offence that he is turned out, which ſhall not prejudice his grantee: as if lord of a manor in fee grant to another the office of bailiff of his manor, and that he ſhall have certain fees ariſing from the execution of his office, he or his heir ſhall not turn him out. However, let us ſee precedents of grants of office of ſteward, how it was antiently granted.

And the matter being moved again,

PER CURIAM. The ſteward is not an officer attendant on the court, and therefore is not intitled to relief thus upon motion; and beſides, if his office concern the ſafe keeping of priſoners, he cannot be impoſed upon the marſhal. *Et ſic finit* (*b*).

(*a*) See ſtatutes 8. & 9. *Will.* 3. *c.* 27. and 27. *Geo.* 2. *c.* 17. (*b*) See S. C. 6. Mod. 57. 91.

Caſe 929.

Anonymous.

PER CURIAM. If there be demurrer to part, and plea to iſſue to part, and judgment upon the demurrer before the iſſue tried, the plaintiff, if he pleaſe, may enter a *non proſ.* upon the iſſue, and take a writ of enquiry of damages upon the judgment on demurrer, but it is not to be taken out till after *non proſ.* entered on the other; for if they will proceed upon the iſſue, the jury that try it ought to enquire of the damages on the other: and here, becauſe a writ of enquiry was taken out without entering of *non proſ.* that matter was moved in bar of final judgment, and thereupon it was ſtayed till they moved of the other ſide.

Caſe 930.

Monger *againſt* Kett.

If one under pretence of being inſolvent get an abatement of a debt, it will be ſet aſide in equity. S. C. 2. Eq. Abr. 479. 394.

NOTE: In the caſe of *Monger* and *Kett* in Chancery, it was held by the Court, that if there be two dealers, and one of them is very much indebted to the other; and in order to get an abatement from him, he makes him believe he is inſolvent by abſconding, ſculking, or ſhutting up ſhop, whereby the other has juſt cauſe to fear the loſs of his debt; and thereby procures a releaſe or an abatement, when in truth the man was really ſolvent; that

that

Court would relieve againſt ſuch releaſe, &c. And this was ſaid to have been often done, and the caſe of *Bonny v. Bonny* cited for an inſtance; *ſecus* if the party had not juſt cauſe to fear the loſs of his debt.

MONGER *againſt* KETT.

* [559]

IT WAS ALSO THERE HELD, That if *A.* mortgage land to *B.* for one hundred pounds, and *A.* owes *B.* alſo one hundred pounds by contract or bond, *A.* ſhall be admitted to redeem the mortgage, without paying the one hundred pounds by the contract or bond, but is left to his remedy on his contract or bond; and hereupon CLEARLY at Bar ſaid, that if I have ſeveral mortgages upon ſeveral lands, for one hundred pounds each from the ſaid perſon, and one of the mortgages proves a bad title, and the other good, the mortgager ſhall redeem the good one without paying of the money upon the bad one.

If one owes money by mortgage, and alſo by bond, he ſhall redeem the mortgage without regard to the bond. *Quære.*

Anonymous. Caſe 931.

If one owes forty pounds by bond, for the payment of twenty at ſuch a day, and twenty pounds by contract to the ſame perſon, payable at the ſame day; and at the day he pays twenty pounds, without telling for which it is, it ſhall be a payment in equity upon the bond, becauſe that is moſt penal upon him.

Payment ſhall be taken on that which is moſt penal.

Anonymous. Caſe 932.

HOLT, *Chief Juſtice.* If an overſeer of the poor contract with tradeſmen upon account of the poor, and upon his own credit, as ſoon as he receives ſo much of the poor's money, it becomes his own debt.

Overſeer of the poor.

Anonymous. Caſe 933.

HOLT, *Chief Juſtice.* Five juſtices of the peace are too many to join in an order for ſettling of a poor; for they may make a majority at the ſeſſions, and ſo confirm their own order.

Five juſtices ſhould not join in order of ſeſſions, on appeal.

Anonymous. Caſe 934.

HOLT, *Chief Juſtice.* A render of principal in diſcharge of his bail is not an execution till *committitur* entered; for till then the plaintiff has his election, whether he will have him in execution or not; but if the *reddidit ſe* be in preſence of plaintiff, then he is committed, it ſhall be adjudged an execution. And a delivery to the tipſtaff is a commitment to the marſhal, for the marſhal is ſuppoſed preſent in court.

Render of principal in diſcharge of bail is not an execution till *committitur* entered.

THE END NOTE: In this action there muſt be a copy of the judgment and of the commitment given in evidence.

Anonymous,

Caſe 935.

Anonymous.

Corporation is not indictable.

NOTE: *Per* HOLT, *Chief Juſtice.* A corporation is not indictable, but the particular members of it are.

* [560]

Caſe 936.

* Anonymous.

Truſtees not anſwerable for each other. Bridg. 35.

IN Chancery, *per* WRIGHT.

FIRST, If there be two truſtees, one of them ſhall not anſwer for receipts by the other, but each is to anſwer for himſelf(a).

Cro. Car. 312. 2. Vern. 515. 570. Salk. 318.

Truſtees not to pay coſts.

SECONDLY, Truſtee ought not to pay coſts where there is no default in him.

Bill diſmiſſed for want of making remainder-man a party.

THIRDLY, Lands were deviſed in truſt for two young ladies, and if they died within age, and before marriage, the remainder over; now the youngeſt being ſixteen years old, and the other eighteen, they brought their bill for execution of the truſt; but it was diſmiſſed for want of making the remainder-man party.

Truſtees having power to appoint agents, not anſwerable for them. 2. Fonth. Eq. 181.

FOURTHLY, If one deviſe to truſtees, and by expreſs clauſe therein gives them power to appoint agents to manage the land, and they appoint one then ſolvent and good, though afterwards he prove inſolvent, they ſhall not anſwer for him; *ſecus* if he were not ſolvent at the time at which he was nominated. But if there were no ſuch direction or power in the will, the truſtees are bound to anſwer for their agents at all events: ſo in caſe of money to be laid out at intereſt.

(a) But ſee Attorney General *v.* Randall, 21. Vin. Abr 534. Boardman *v.* Moſman, 1. Bro. Ch. Rep. 68. Sadler *v.* Hobbs, 2. Bro. Ch. Rep. 116. Kebble *v.* Thompſon, 3. Bro. Ch. Rep. 112.

Caſe 937.

Anonymous.

Appeal lies from juſtices to ſeſſions, in reſpect of overſeers accounts.

PER CURIAM. Juſtices of peace are not abſolute judges of the accounts of the overſeers of the poor, but an appeal lies from them to the ſeſſions, in caſe of overcharge or other wrong; but juſtices may audit the account of the overſeer before the year be out; if not, in caſe he be turned out before that time (a).

(a) See 43. *Eliz.* c. 2. *ſ.* 2. & 4. the 17. *Geo.* 2. c 38. *ſ.* 4. Rex *v.* Hedges, Salk. 533. the Whitechapel Caſe, 16. Vin. Abr. 417. Rex *v.* Bartlett, 2 Stra. 983. S. C. 1. Conſt, 264. Rex *v.* Whitcar, 3. Burr. 1365. and Mr. Conſt's caſe of Bott, 1. vol. page 261, &c.

Caſe 938.

Anonymous.

If notice of trial be countermanded, muſt pay coſts.

IF upon notice of trial defendant draws breviats, retains Counſel and makes ready his witneſſes, before that notice is countermanded, upon affidavit thereof, and motion, he ſhall have ſuch coſts as Maſter ſhall tax.

Anonymous,

Anonymous.

Caſe 939.

ient be irregularly obtained, a releaſe of errors ſets it all purpoſes.

Releaſe of errors.

Anonymous.

Caſe 940.

DLT. One arreſted by proceſs of this Court, for want il, goes to cuſtody of THE MARSHAL, and afterwards by *pus* gets himſelf turned over to THE FLEET; ſurely the iall not thereby loſe the benefit of declaring againſt him of the marſhal. But if he removes himſelf in that caſe out of ſheriff into the *Fleet*, ſo that he never was in cuſ- IE MARSHAL,

If one who for want of bail is turned over to the marſhal gets himſelf turned over to the *Fleet*, he may be declared againſt *in cuſtodiâ, per Holt.*

for there may be a difference; though even there it will ous to ſuffer ſuch removal to prejudice of the firſt plain- n.

* Anonymous.

Caſe 941.

: Before the late act of parliament (*a*), one in priſon of FLEET could not be declared againſt, without bring- *habeas corpus* into court; but the courſe here was to claration with the turnkey.

Proceeding againſt priſoners previous to 4. & 5. *Will. & Mary*, c. 21.

Mod. 306. 1. Wilſ. 120. 2. Burr. 1051. 1. Term Rep. 191. Tidd's Practice, 168. 198.

(*a*) 4. & 5. *Will. & Mary*, c. 21.

Anonymous.

Caſe 942.

TMENT for uſing a trade for three months, from ſuch o ſuch a day, not having ſerved ſeven years, &c. Not ided; and the defendant found guilty for one month, and of the reſt.

On an indictment on 5 *Eliz.* c. 4. for uſing a trade for *three months*, the defendant may be found guilty of uſing it *one month*.

S MOVED *in arreſt of judgment*, That it was uncertain of the three months he was found guilty; and therefore ant could not plead this conviction in bar of another in- or the ſame offence:

R CURIAM, He may plead a conviction for one month, IOC, that he was guilty in any other month.

dgment was given for the king.

Anonymous.

Caſe 943.

Anonymous.

A bill diſmiſſed may be pleaded in bar.

IN chancery, if a bill be diſmiſſed with coſts, it is a good plea in bar to another bill for the ſame cauſe, without oath that the matters are the ſame, only Counſel's hand being to it.

A new defendant may be added to a bill in chancery.

And one may add a new defendant without paying coſts, ſo that ſuch addition does not make the other defendants to change their anſwer.

Caſe 944.

Sir Richard Leving *againſt* Lady Calvry.

Writ of error cannot be diſcontinued without leave of the Court; and if no error aſſigned, judgment will be affirmed. S. C. Ld. Ray. 330. 695. S. C. Comy. Rep. 118. 2. Cromp. Pract. 361.

IN error, want of original was aſſigned for error, the original having been loſt upon the death of the plaintiff below's attorney; upon affidavit of this fact THE LORD KEEPER granted them a new original, and that ſhould be certified; and a *certiorari* being brought, and the original being certified, now the defendant in error would bring on the matter in order to have his judgment affirmed, and coſts.

And now it was moved that this would be very hard upon the plaintiff, who at the time of the writ of error brought had good cauſe, though that were now cured by a new original; and for this the caſe of *Naydon v. Winterbotham*, about three years before, was cited.

But PER CURIAM, The plaintiff cannot diſcontinue his writ of error without leave of the Court; for if you do not aſſign error, we will affirm the judgment; and the Court would make no rule.

* [562]

Caſe 945.

* The King *againſt* Fitzgerald.

A defendant to an indictment for a miſdemeanor may imparle until the enſuing Term. S. C. 1. Ld. Ray. 706.

FITZGERALD was bound by recognizance to appear here the firſt day of Term, and was called on, but did not appear; but came afterwards and entered his appearance with MR. HARCOURT, his clerk in court, and would imparle till next Term; which the ATTORNEY GENERAL did oppoſe, for that he ought only in this Term to imparle to *Craſtin. Animar.* And heretofore when one came in upon a recognizance, he muſt have pleaded *inſtanter*, ſo it was if he came in upon a *habeas corpus*, *reddidit ſe*, or *exigent*; but this was thought hard, and is remedied ſince the Revolution (*a*).

(*a*) It is ſaid, S. C. Ld. 1. Ray. 706. that it was ruled by the advice of the Clerks that he ought to imparl until next Term: the ſame law if he comes in upon attachment: but upon *capi* returned to a *capi* he ſhall plead *inſtanter*.

The

The King *againſt* Young.

Caſe 946.

HIS caſe being moved again: *Per* HOLT, *Chief Juſtice*, To try the defendant in this court, there muſt be a *venire facias*, rnable at the common day, and fifteen days between the *teſte* return of it (*a*). And though the record of outlawry, and all other proceedings againſt him, be in this court, yet by the ite of 6. *Hen.* 8. *c.* 6. (*b*) we may ſend them down to THE › BAILEY; but we could not ſend them a record of an indict- t before that ſtatute; and ſuch caſes have been ſometimes at *niſi prius* (*c*). And he quoted the caſe of one *Turner* in ORD HALE's time, who was brought hither from the OLD- EY to reverſe his outlawry; and the Court were clear for ng him back, if the proſecutor had not deſired he ſhould be here. And in all caſes whatſoever, where the indictment ens to come hither, though it be not by *certiorari*, we may r diſcretion ſend it back.

When an indictment comes into *B. R.* it may either be tried there, or ſent back, as the Court thinks proper. Ante, p. 544. 545.

nd ſo it was ruled here.

› 2. Roll. Abr. 626. 2. Hale, 260. R. 568. 4. Hawk. P. C. ch. 41.

(*b*) 3. Hawk. P. C. ch. 3. ſ. 8.
(*c*) 4. Inſt. 74. Ray. 364. 3. Hawk. P. C. ch. 3. ſ. 7.

Nailor's Caſe.

Caſe 947.

AILOR was a priſoner in THE COUNTER for want of bail, and a *ne exeat regnum* directed out of chancery to the ſheriff London, to hold him to ſecurity not to leave the kingdom with- licence; and a *habeas corpus* being moved for, in order to rge him with an action in this court,

A perſon in cuſtody on a *ne exeat regnum* may be brought into the court of king's bench by *habeas corpus*, and charged with an action. S.C. 1. Ld. Ray. 696. S. C. Holt, 494.

BROTHERICK objected, that he could not be turned over to E MARSHAL, for then the ſheriff of *London* could * not obey mandate of the *ne exeat regnum*, VIZ. to detain in cuſtody till Found ſureties, &c. and he ſaid the ſuggeſtion of that writ is, : the party has ſome ill deſign againſt the Government, and is traverſable; and to prevent his executing ſuch deſign is the of the writ; and ſome of them mention a ſum certain that he › find ſecurity in; others leave that matter to the ſheriff, who, n default of ſuch ſureties, is to carry him to the common gaol he county, there to be ſafely kept till he voluntarily give ſuch rity; and this is to be certified by the ſheriff into chancery: there is no way to diſcharge this, but by a paſſport under the t or privy ſeal, or privy ſignet.

* [563]

HOLT, *Chief Juſtice*. Suppoſe he had been in the ſheriff's ody, by a writ of this Court, at the time of the *ne exeat regnum* ing to him, as you would have it, he cannot be removed out is cuſtody; ſo that the writ would be a kind of a ſanctuary to . It is true, if the ſheriff take the ſecurity, he ought to certify

NAYLOR'S CASE.

tify it into chancery; and it is true it is out of the ſheriff's power, by the removal, to detain him, or take ſecurity; but we may keep him in our cuſtody till he find ſecurity, and ſo there will be no miſchief; but if we take it we may keep it here. And here the writ has no ſum certain, and this writ is not an action as a *homine replegiando*; and all the ſheriffs in *England* are officers to this Court; and it is very extraordinary when one is in priſon for want of bail, to charge him with a *ne exeat regnum*, and it looks like a trick to prevent a *habeas corpus*.

But the *habeas corpus* was granted.

Caſe 948.

Vines *againſt* Doderidge.

A *modus* to pay two ſhillings in the pound on the yearly rent in lieu of all tithes is bad. Bunb. 301. Cro. Eliz. 71. 276. 1. Leon. 94. 3. Com. Dig. "Diſmes" (E. 15.)

PROHIBITION was moved for to ſtop a ſuit in THE SPIRITUAL COURT for tithes, upon a ſuggeſtion, that there was *a modus* to pay two ſhillings in the pound of yearly rent for all tithes.

HOLT, *Chief Juſtice*. A *modus* muſt be of ſomething certain, that may be demanded in the ſpiritual court; and here, ſuppoſe the land be let out for a fine and five ſhillings rent, what becomes of the *modus*, or of the parſon? And a cuſtom cannot be laid in a rent, which is alterable at the pleaſure of the parties; and beſides, this cuſtom would amount to a plain *non decimando*. *Vide* the great caſe in *Ro. Ab.* 378. to pay two ſhillings for all tithes. *Hob.* 192. And he ſaid, * if the caſe of *Perkin v. Perkin* came in queſtion again, he would deſire to hear it argued, for he was not ſatisfied with the judgment of it.

* [564]

Caſe 949.

Anonymous.

Habeas corpus returnable at a day certain.

A PRISONER was brought up by *habeas corpus* returnable at a day certain, and the gauler did not bring him into court, but carried him back, and brought him in the next day.

This being a writ returnable at *a day certain*, you cannot bring him in at another day by virtue of it. *Secus*, if the writ were returnable *immediatè* (*a*).

And the gaoler was ruled to be at the charge of a new writ.

(*a*) 2. Burr. 777. Tidd's Pract. 167. The old rule of Court made Mich. Term 1654, directing the *habeas corpus* to be made returnable in court at a day certain in Term, unleſs directed to the ſheriffs of *London* or *Middleſex*, or unleſs it be to deliver over the defendant in diſcharge of his bail, is fallen into diſuſe, and the writ is now made returnable before the Chief Juſtice at his chamber *immediatè*, and ſhould be returned in due and convenient time. 3. Burr. 1875. 1. Tidd's Pract. 169.

Turner

Turner *againſt* Burnaby.

Caſe 950.

WO attornies at the tavern agreed each to name twenty-four to the ſheriff, out of which he ſhould return twenty-four to in iſſue.

Attornies of each ſide may agree to name twenty-four perſons, out of which ſheriff may return twenty-four to try the iſſue. S. C. Hok, 266. 703.

nd PER CURIAM, If the ſheriff will return a jury at the de- ination of any perſon, it is a miſdemeanor in him, and it may naintenance in him at whoſe requeſt it is done (*a*); but here eing by conſent of attornies of either ſide, *conſenſus tollit rem.*

(*a*) See the ſtatute 3. *Geo.* 2. *c.* 25. which preſcribes the method by a the ſheriff is now to nominate, ct, and return a common jury: and Tidd's Practice, 514. for the manner of nominating a ſpecial jury: and 3. *Geo* 2. *c.* 25. *ſ.* 15. for ſtriking a jury on a trial at bar.

Anonymous (*a*).

Caſe 951.

a ſervant uſually employed to pawn goods for his maſter, or borrow money for him, borrow of me, or pawn his maſter's s with me for money; I ſhall maintain debt againſt the maſter upon (*b*).

Debt lies againſt a maſter for money borrowed by his ſervant.

2. Lev. 172. 5. Mod. 398. 1. Stra. 506 3. Bac. Abr. 560.

CONDLY, If my ſervant has a note for money due to me, or goods, which in their nature are not properly in the cuſtody ervant, that is evidence *primâ facie* that he has an authority me to apply them to ſuch uſe as he does afterwards put them; ne contrary may be given in evidence, as that he came by the by undue means, or had it to another particular purpoſe.

A ſervant keeping his maſter's caſh is preſumptive evidence of his authority to apply it.

IRDLY, If a man has a bill of exchange, he may authorize er to indorſe his name upon it by parol; and when that is it is the ſame as if he had done it himſelf.

An indorſee may, by parol, authorize another to indorſe his name in it. Ante, 346. Kyd on Bills, 189.

URTHLY, If I pawn goods to *A.* for ſuch a ſum, *A.* may debt for the money, notwithſtanding his having a pawn.

The pawnee may have debt for the money advanced. Salk. 523.

HOLT, *Chief Juſtice, omnia.*

At *niſi prius*, before HOLT, *Chief* Ward *v.* Evans, Salk. 442.

Hughes *v.* Smith, 1. Will. 328 Fenn *v.* Harriſon, 3. Term Rep. 757. 4. Term Rep. 177.

* [565]

Anonymous.

Caſe 952.

niſi prius, before HOLT, *Chief Juſtice*, this caſe happened: *A.* being indebted to *B.* gives him a note in a feigned name debt: afterwards * the wife of *B.* runs away with another and takes the note with her; *A.* pays the money to *B.*; the

One not to be witneſs where he may be intereſted. 1. Stra. 575. 3. Term Rep. 31.

perſon

Anonymous. perſon with whom the wife ran away ſues *A.* for the money feigned name.

At the trial *B.* offered to make oath of all this;

But was rejected by HOLT, *Chief Juſtice*, for it was to right in himſelf to the money received from *A.* for which wife he was accountable to *A.*

Caſe 953. Holden *againſt* Sutton.

Whether debt by executor for an eſcape of one in execution of a judgment of the teſtator in the *debet* and *detinet*, be helped by verdict.

DEBT by an executor for an eſcape of one in executi judgment of teſtator, and declared in the *debet* and *de*

And after verdict this moved in arreſt of judgment. An ing doubted whether it was helped by the general words "ters of like nature" in the ſtatute of 16. & 17. *Car.* 2. to it at another day, were quoted, 1. *Sid.* 379. 341. 2. *Keb.* 4 is, that it was helped after verdict.

S C. 1. Ld. Ray. 698.
5. Co. 31.
1. Lev. 250, 251.
2. Lev. 130.

But HOLT ſaid, that *debet* always is where the action i party's own right.

Et adj.

Caſe 954. Anonymous.

Reference to a Maſter.

HOLT, *Chief Juſtice*. Upon a reference to THE M if upon ſervice of a rule to attend him one of the will not attend, the courſe is to move the Court that THE M may examine *ex parte*, and ſo make a report.

Caſe 955 Anonymous.

Surety of the peace.
1. Lev. 107.
2. Lev. 228.
Moor, 874.
Stra. 473.

TO have ſecurity of peace of one, you muſt make aff the cauſe of fear, and exhibit it in articles; and th affidavit that you demand this not of any ill will or malice of fear of ſome bodily hurt.

2. Hawk. P. C. ch. 60. ſ. 6.

Caſe 956. Anonymous.

Ante, p. 555.

BOND may be ſealed with a wafer.

Caſe 957. Anonymous.

Evidence.

COPY of a bill in chancery taken from file wit evidence.

Ano

Anonymous. Caſe 958.

IE cannot give evidence of anything done at a former trial without producing the record of the former trial (*a*).

Record muſt be produced. Ante, 555.

2. Roll. Abr. 574. 9. Co. 30. Wharton, Palm. 524. Whitmore *v.* : 117 Buil. N. P. 230. Foſ- Rooke, Sayer. 299. Hewſon *v.* Brown, Cole, 1. Stra. 781. Biggs *v.* 2. Burr. 1024.

Anonymous. Caſe 959.

. HOLT, *Chief Juſtice*, at *niſi prius*. *A.* orders *B.* to re- ive money from *C.* for him. *B.* orders *C.* to pay the money . to whom *B.* owes money. *C.* accordingly does pay it. ll maintain an action againſt *B.* as for ſo much money re- l to his uſe. So if in that caſe *B.* had drawn a bill upon *C.* e money, or generally for ſo much money, if *C.* has no s of *B.* in his hands; his anſwering ſuch bill is a payment of ebt to *B.* for which *A.* may maintain his action againſt

Money received to the uſe of another.

1. Salk. 9. 2. Mod. 263. Cowp. 565. Dougl. 137. 139.

* [566]

* Anonymous. Caſe 960.

. HOLT, *Chief Juſtice*. There never is a diſtribution or- red by the eccleſiaſtical court (*a*) but where the party dies te, or the will directs it; but chancery (*b*) does ſometimes e a diſtribution where the will does not direct it.

Diſtribution in ſpiritual court and chancery.

ee 5. Mod. 247. 1. Ld. Ray. 2. Chan Caſes, 95. 3. Peer. Wms. 99. 1. Brown C. C. 328. 2. Com. Dig. "Chancery" (3. D. 1.). ee 2. Vent. 362. 1. Vern. 134.

Anonymous. Caſe 961.

BT by huſband; and it appearing to have become due to is wife as a ſeparate dealer, a diſcourſe of the wife's con- g it was given in evidence for the defendant (*a*), *annuente*

Wife's converſation evidence againſt *baron*.

ut ſee *contra* the caſe of Bentley Johnſton, 1. Stra. 504. Kerſlake *v.* , cited 2. Term Rep. 265. Shepherd, Eſpinaſſe Dig. 722. Hill *v.* Dinwcody, 4. Term Rep 678. Hill, 2. Stra. 1094. Barker *v.* Dixie, ous, 1. Stra. 527. Williams *v.* B. R. H. 252.

Elizabeth Claxton's Caſe. Caſe 962.

ZABETH CLAXTON was committed to the *New Priſon* *Juſtice* PERRY, there to remain till ſhe found ſecurity for od behaviour, for being taken in a diſorderly houſe (*a*). ng brought up by *habeas corpus*, her Counſel moved for her ge.

The being found in a *diſorderly houſe* is not of itſelf ſufficient cauſe to bind the party to her good behaviour.

ee the ſtatute 34. *Edw.* 3. c. 1. 4. Inſt. 181. 2. Hawk. P. C. 7th edit. . 2. 3. C. Holt, 406.

ELIZABETH CLAXTON'S CASE.

FIRST, Becauſe that being taken in a diſorderly houſe was no reaſon to require ſureties of the good behaviour; for that any honeſt perſon might accidentally be there, and know nothing of its being ſuch a place.

Quod fuit conceſſum.

Commitment.

SECONDLY, That in caſe it were cauſe, yet the commitment is to an illegal gaol, *viz. The New Priſon.*

A lewd woman ſhall be ſent to the houſe of correction.

THIRDLY, That in caſe a woman's being taken in a diſorderly houſe be reaſon to take her for a lewd woman, and ſo within the juriſdiction of a juſtice of peace by the 39. *Eliz.* c. 4. yet the way was to ſend her to the houſe of correction, but not to require ſureties of the good behaviour of her.

A juſtice cannot commit, or bind a perſon to good behaviour for being found in a bawdy-houſe, unleſs he adjudges him to be a diſorderly perſon.

11. Mod. 415.

HOLT, *Chief Juſtice.* It is not true to ſay, that every one that has not a viſible way of living ſhall be liable to find ſureties of the good behaviour. Indeed if one live extravagantly and high, who has no viſible way of getting, it may be reaſonable to inquire how he lives; but if a man live in a reaſonable quiet manner, it is hard to hold him to it. But lewd and diſorderly perſons may be held to the *good behaviour*, or committed to *gaol*, or they may be ſent to the *houſe of correction*. But what is it makes a lewd perſon? It is not being catched in a houſe of bawdry, or a diſorderly houſe, at a ſeaſonable time. And though a juſtice of peace may be a judge of who is a lewd and a diſorderly perſon, and therefore if the commitment had ſaid, that it had appeared to him that this perſon was ſuch, we would have taken his word for it; yet when he aſſigns the reaſon of his judgment, and we find that reaſon will not maintain it, we are not to * regard his judgment; and as perſons of ill behaviour are to be puniſhed, ſo great care is to be taken of the innocent.

* [567]

And being remanded, and brought up again at another day, ſeveral affidavits were read of her lewdneſs;

Whereupon THE COURT quaſhed the juſtice's commitment, and ordered a rule to be drawn for her commitment to THE MARSHAL thus: "Becauſe it appears to us, that ſhe is a lewd "woman and a frequenter of bawdy-houſes; *ideo* ſhe is commit-"ted till ſhe find ſureties of good behaviour."

Conſtable may commit lewd women.

Poph. 208.

Latch. 173.

And HOLT, *Chief Juſtice*, quoted 13. *Hen.* 7. c. 10. that a conſtable may commit lewd women till they find ſureties, and neighbours are bound to aſſiſt.

2. Hale, 97. 3. Hawk. P. C. ch. 13. ſ. 8.

Caſe 963. Anonymous.

A common jury being returned inſtead of a ſpecial jury, is no cauſe for a new trial.—Vide poſtea in this Term, Watſon v. Sutton.

IN action for words a rule was, for the ſheriff to return a ſpecial jury, who, notwithſtanding the rule had been ſerved upon him, returned only a common jury.

After

ıfter trial this was moved by the defendant for a new trial; ANONYMOUS.

Vhich was denied, becauſe he had made a defence; for ſince, ıe verdict had gone for him, he would have had the advantage t, it is fit he ſhould ſubmit to it, that it is gone againſt him; r if he had not made a defence (*a*).

) In what caſes and under what inſtances this Court will grant a new trial, ſee Tidd's Practice, 604 to 612.

Dundee *againſt* Petty.

Caſe 964.

CAPIAS being returned againſt the principal, he brings error immediately, and the plaintiff brings debt upon the recognıce againſt the bail, and delivered a declaration as of the preınt Term.

After *capias* returned againſt *the principal*, the plaintiff may proceed againſt *the bail*, though there be a writ of error.

1. Burr 340. Tidd's Pract. 144. 280. 2. Stra. 872. 1270.

ıOUNTAGUE moved for an imparlance. He urged, that if the ntiff had gone by way of *ſcire facias*, the bail might render the cipal at any time before the ſecond *ſcire facias*, returned. *Godton v. Lee* (*a*). And there is no reaſon but the bail ſhould : the like time in this caſe; and this he cannot do without the ur and aſſiſtance of the Court, for the recognizance being ited by the *non eſt inventus* returned upon the *capias*, a ſubent render of the principal cannot be pleaded in bar of the on.

nd THE COURT afterwards made a rule, there ſhould be in this eight days in full Term for the bail to render the principal.

nd PER CURIAM, After *capias* returned againſt the principal, gh writ of error be brought, yet the plaintiff may proceed ınſt the bail; for the writ of error does not ſuperſede the recogıce.

(*a*) Raym. 14.

* [568]

* Hayward *againſt* Kinſey.

Caſe 965.

:ROR of a judgment in the court of common pleas in an action on the caſe laid in *London*, wherein the plaintiff below ared, that the defendant's teſtator the fifth of *March*, in the th year of *James the Second*, was indebted to the plaintiff's inte in forty pounds, money lent, &c. AND ALSO in the like of forty pounds on account, and promiſed payment, &c. : defendant pleads *non aſſumpſit infra ſex annos*. *Replication*, t the plaintiff's inteſtate the eighth of *May* in the fourth year of *es the Second*, *ſuprad.* did ſue out a *quare clauſum fregit* againſt defendant's teſtator in the common pleas, directed to the ſheriff *Dorſetſhire*, with intent, upon the defendant's appearance there, to declare againſt him *ex cauſa præd.* now in the declaration

An original in *clauſumfregit* ſued out in *Dorſetſhire* above ſix years, and caſe thereon within ſix years in *London*, will not prevent ſtatute of Limitations.

HATWARD *againſt* KINSEY.

ſet forth, but that he did not appear, but died the twelfth of *April* 1693; that the defendant was his executor; that the plaintiff's inteſtate *recenter poſtea*, *viz.* ſuch a day, ſued out another *quare clauſum fregit* againſt the defendant, directed to the ſaid ſheriff of *Dorſetſhire*, returnable ſuch a day, with intent, upon the defendant's appearance thereunto, to declare againſt him *ex cauſa præd.* but the defendant did not appear; that afterwards, at ſuch a time, the plaintiff's inteſtate died, and adminiſtration was committed to the plaintiff, who *recenter poſtea*, *viz.* the ſeventh of *April* 1697, about fifteen months after the adminiſtration committed, ſued out the writ on which he now declared. Upon demurrer to the replication, judgment was for the plaintiff in the common pleas, of which this error is now brought.

NOW IT WAS ARGUED *for the plaintiff in error*, by CHESHIRE, that this original ſued out in *Dorſetſhire* did not ſerve, this action being laid in *London*; for it is a maxim, that *quælibet narratio ſuper brevi locari debet in com. in quo breve emanavit.* And though the plaintiff in a perſonal action has election to lay his action in what county he will; yet that muſt be at the commencing of his action; for if it appear to the Court, that the cauſe of action did ariſe in another county, they will change the *venue* to that county; as if aſſault and battery be in *London*, the party may lay it in what county he pleaſes; but if he ſue an original to the ſheriff of *Middleſex*, and declare in *London*, it will be bad. *Cro. Jac.* 479. 674. In an *indebitatus* original was directed to the ſheriff of *Devon*, and the action laid in *Exeter*, and for that, ill. *Cro. Car.* 272. That an original in one county cannot warrant an action in another county; and therefore * it ſhall be intended without original, which is helped by the ſtatute. 1. *Cro.* 281. And *Maſſe and Bruerton's Caſe (a)*, *Aſſumpſit* laid in *Norfolk*, *non aſſumpſit infra ſex annos* pleaded; and an original taken out in *Suffolk* replied; and a judgment for the plaintiff in the common pleas reverſed for this error. And it will not ſuffice to ſay this is the courſe of the court of common pleas, and the courſe of a court of *Weſtminſter Hall* is the law of it, of which the other courts will take notice; for there is a diverſity when ſuch courſe is directly againſt law, for then it cannot prevail; *vide Pettifer's Caſe (b)*. And when ſuch courſe is not againſt law, as by the courſe of that court there goes but one *ſcire facias*, though there be two here; but becauſe the law does not require two, it is well; and ſurely to plead a *clauſum fregit* in one county, which is a local action, to preſerve a tranſitory action in another county, is a very illegal courſe.

Maxim.

Though perſonal action may be laid any where, yet if the cauſe of action appear to ariſe in another county, the *venue* will be changed.

* [569]

Where courſe of the Court is againſt law, it cannot prevail.

Serjeant HOOPER, *for the defendant in error*, divided it into three points. FIRST, Whether this courſe of declaring in any action or county, upon the defendant's being brought in upon a general *clauſum fregit*, be erroneous? SECONDLY, Whether, as

(*a*) Eaſter Term, 11. *Will.* 3. (*b*) 5. Co. 32.

this

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ſe is, the writ lies for the defendant by *Journeys Accounts*? DLY, Though it ſhould not be good by *Journeys Accounts*, er, as it is, it ſuffice not to preſerve the debt, notwithſtand- e ſtatute?

.ST, And he argued, that ſince there is ſuch a courſe common pleas for a plaintiff to bring a defendant in upon a *n fregit*, and then to declare againſt him in what county vhat action he pleaſed; and alledged on record that there a uſage, and that confeſſed by demurrer; now this Court ake notice of it as the law of the Court; *vide* 1. *Jo.* 417, *ar.* 526, 527. contrary to *Pettifer's Caſe (a)*. And the of the Court is to be allowed for law; he quoted 1. *Jo.* *March*, 59. *Lane's Caſe (b)*; *Slade's Caſe (c)*, great re- multitude of precedents; *Wiſcott's Caſe (d)*. A common ry of lands in *Wales* is ſuffered upon a *quod ei deforceat*, *proteſtando* to proſecute in the nature of a writ of entry in *it*; and though a *quod ei deforceat* be properly when a par- tenant loſeth by default, and is grounded upon *a tort*, and ıer writ upon a right; yet will they not reverſe ſuch judg- or error. 1. *Jo.* 381. *Cro. Car.* 414. Upon an *audita* r ſued out in chancery, the party finds bail, who bind lves in a recognizance, that the plaintiff ſhall appear *et juri in ea parte*. And in a *ſcire facias* brought thereupon, each * aſſigned was, that the party did not pay the condem- , or go to gaol; and though that be not mentioned in the ıizance, yet becauſe the courſe of chancery is to take them : manner, the Court will take notice of it. 2. *Cro.* 67, 68. ıe *Caſe of Brierton* cited of the other ſide differs from this. IRST, both the writ and declaration were in caſe; ſo that it ain the writ appeared to have been deſigned for the original t action, and therefore variant and void; but here this writ is a *clauſum fregit*, and the count is in caſe. SECONDLY, ıſage of the common pleas was not there averred, as it is and ſo confeſſed by the demurrer; and he relied upon 1. *Jo.* 313. 1. *Cro.* 294. The ſtatute of Limitation was pleaded ebt upon an *aſſumpſit*; the plaintiff replied, that at ſuch a vithin the ſix years he ſued out an original againſt the de- it to the ſheriff of *H.* and that thereupon the defendant was ved; and that after ſuch a time the outlawry was reverſed; ıat within a year after he ſued the writ, on which the now is founded againſt the defendant, into *Suffolk*, and avers to be for the ſame cauſe; and a demurrer; and though the held there had been a variance between the firſt and ſecond , yet becauſe they were averred to be for the ſame cauſe, ıat confeſſed by the demurrer, the plaintiff had judgment, . *Sid.* 328. That this is a courſe which has now obtained

Courſe of the Court is law.

* [570]

5. Co. 32.
ſmith *v.* Lane, 2. Co. 16.
(*c*) 4. Co. 92.
(*d*) 2. Co. 60.

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in the common pleas. *Vide* 2. *Vent.* 193. 259. But NOTE! There is no judgment in either caſe.

Whether the writ be well by *Journeys Accounts*.

SECONDLY, Whether the writ be well by *Journeys Accounts*; and he agreed the opinion in 6. *Co.* 10. was againſt him; for there it is ſaid to lie in no caſe but between the ſame parties, and neither for nor againſt executor or adminiſtrator; but he ſaid this was no reſolution, for it was no point in queſtion in the caſe; and though *Coke* quotes many authorities for it, yet none of them does warrant it; but the reaſon of the law, as well as authorities, ſeem againſt him. 10. *Edw.* 3. 490. is there quoted in point, and there is no ſuch folio in any Book, new or old, of that king, and all the other caſes concern only the affirmative part of the propoſition, that where there are more plaintiffs or defendants than one, and one of them dies, it lies; and *F. N. B.* 32. is againſt him. 1. *Edw.* 3. 17. 8. *Hen.* 5 6. In a *quare impedit* the defendant died. and a new writ purchaſed *per Journeys Accounts*, and the diverſity there taken, where it is abated by the act of God, and where by the act of the party; where it is by the act of God, it will lie; otherwiſe * where it is by the act of the party; and ſurely theſe are rather againſt my *Lord Coke* than for him: and the reaſon of *Spencer's Caſe* is alſo againſt this opinion; for there it is held, in caſe of any default in the clerk, as falſe *Latin*, variance, want of form, &c. whereby the writ abates, the plaintiff ſhall have a new writ *per Journeys Accounts*. And ſo in ſome caſes even where there is ſome default in the plaintiff; as if it abates for non-tenure of parcel, that is when more is demanded than the tenant holds, or when it abates for jointenancy with another in the defendant; for it is hard, ſays the Book, the plaintiff ſhould ſuffer for not taking notice of what lies not properly in his conuſance; yet theſe are things which by diligence and means might be found out; and to ſay that he ſhould have *Journeys Accounts* there, where he might poſſibly prevent his writ's being abated by finding out the quantity of the land in the defendant's tenure, or the quality of his eſtate, and not where his writ abates merely by death, the irreſiſtible act of God, would ſurely be againſt all reaſon. And if this writ did not lie againſt the heir, he might alien before action brought; and executors would avoid juſt debts, as here. *Br. Quare Imp.* is flat againſt me, but the Book which he abridges is for me.

Journeys Accounts will lie where abates by act of God; *aliter* where by act of the party.

* [571]

THIRDLY, All theſe caſes were before the ſtatute of Limitations; and therefore ſince the ſtatute has limited the plaintiff in time to claim his right, if a writ abated by the act of God would not be capable of reviving, and ſo brought out of the ſtatute, it would be extremely miſchievous; and he quoted the caſe of one *Thoroughgood* in the common pleas, *Trinity Term*, 8. *Will.* 3. *Roll* 370. where an executor *durante minoritate* brought an *aſſumpſit*, and pending it the infant came of age, and brought a new writ *recenter*, to which *non aſſumpſit infra ſex annos* was pleaded, and this matter ſet forth in the replication, and judgment for

he plaintiff; and the ſtatute never meant to bar a right where e are no laches in the plaintiff, as here there are none; where action brought in due time determined by the act of God. l this is the reaſon of the proviſo in the ſtatute of Fines, which ed is for caution, and not of neceſſity. *Cro. Eliz.* 219. *Leo.* 297. 1. *And.* 264. If infant enters within five years r a fine, he ſhall avoid it for ever. So if he enter before he es of age, though that be out of the words of the proviſo. f one be outlawed, within ſix years afterwards he reverſe it, and after the ſix years a new writ is brought, the ſtatute is no 1. *Sid.* 228. * Action begun in an inferior court, and oved up by *habeas corpus*, you begin upon it here above, and revent the ſtatute. 2. *Inſt.* 519. 1. *Sid.* 53. *Latitat* in court prevents the ſtatute of Limitations, but the continues muſt be entered, which may be done by an attorney in chamber; and he concluded, that the courſe of one of the courts *Weſtminſter Hall* is the greateſt evidence of the law that can and greater than any Book-Caſe.

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Latitat in B. R. prevents the ſtatute of Limitations.

HOLT, *Chief Juſtice.* You ſay that it is the courſe of the rt time out of mind; the queſtion is, Whether that muſt be ted, or, if it be contradicted, how it ſhall be tried? It can be by jury; therefore alledging or not alledging it is not erial; for if it be the courſe of the court, it is matter of , of which we, as Judges, muſt take notice. Such a way obtained; but the queſtion is, Whether ſuch a courſe has ef- cy enough to be a good ground for a declaration? And ſup- , when the defendant comes in and puts in bail, he demands of the original; do you think it will be enough to give him of the *clauſum fregit?* And as to the *Journeys Accounts*, plaintiff's inteſtate brings an action within ſix years, and it is ceeded, and pending it the plaintiff dies, and the ſix years are ſed in the *interim*, it were reaſonable that the adminiſtrator ght have another action within convenient time, and have be- it of the firſt action for the preſervation of the right againſt ſtatute, as the practice has been in caſes of outlawry. But if heir in tail bring a *formedon* within five years after a fine levied a third perſon, who is not his anceſtor in tail, but a diſcon- uee for the purpoſe, and pending it, and after the five years, iſſue dies, whether the next heir in tail ſhall have benefit of *formedon*, by bringing a new one in convenient time? It were ſonable he ſhould, but that has not been determined. And it plain *Journeys Accounts* will not lie in this caſe, for the rule is, t it muſt be between thoſe that were parties to the firſt writ. d beſides, the new writ is to be the ſame with the former; and writ that lay for the anceſtor, or for the teſtator, is not the e that lies for the iſſue or executor, but one of another nature. an aſſiſe be brought within twenty years after a diſſeiſin, and ore judgment twenty years paſs, and then the demandant dies, heir cannot have another aſſiſe, but he muſt have a writ of

Vide 1. Vent. 45.

Journeys Accounts muſt be between parties to the firſt writ.

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entry; and it will be hard to prove the heir can proceed by *Journeys Accounts* in that caſe; for it is another writ he is intitled to now by the death of his anceſtor; yet ſtill he may be out of the ſtatute of Limitations. To deliver a declaration in ejectment is the courſe of this court; and it was thought by ſome, that if a declaration had been delivered within twenty years, that would tantamount to an entry; but it is quite otherwiſe; for though a declaration be delivered within twenty years, and a trial, whereby there is leaſe, entry and ouſter, confeſſed; yet that will not amount to an entry, to bring it out of the ſtatute of Limitations, though an entry be actually confeſſed; for it muſt be an actual entry, though an ejectment be a cuſtomary way of proceeding. And this has been ſo adjudged. And if a thing be laid by way of preſcription, which does not lie in preſcription, and it be demurred unto, that does not confeſs it; for if this be a courſe of the court, it is law; and if it be law, we are to take notice of it. If one ſays that he was ſeiſed of a manor, and that he, and all thoſe whoſe eſtate he has therein, had a court-baron, that would be a void preſcription; becauſe a court-baron is incident to a manor of courſe; and this is the reaſon of *Lane's Caſe*; and a leaſe by the Chequer is a permanent intereſt. And ſuppoſe the inteſtate, after the action brought, had died within the ſix years, ſo as the adminiſtrator had convenient time to bring the action within the ſix years, and that he does not do, but brings it after the ſix years, that will not help him. So it ſeems in that caſe, not bringing the action within the ſix years would be a *deva-vit*. And though in 2. *Rich.* 3. 9. *b.* the courſe of the common pleas be pleaded, yet that need not be; and it is like laying the cuſtom of *England* in charging a carrier or inn-keeper for goods neglected or ſtole from them; which cuſtom, though alleged, yet is not triable, but is the common law, of which the Court muſt take notice; and if in that caſe a cuſtom were laid, that a carrier or inn-keeper ought to keep the goods as their own, it would be ill; for there is no ſuch cuſtom; and to plead what one need not plead would be folly.

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Actual entry muſt be to prevent ſtatute of Limitations.

Vide 1. Vent. 42. 1. Saund. 319. 1. Mod. 10. 2. Keb. 555.

If inteſtate dies within ſix years, and adminiſtrator had time to bring action within ſix years and does not, ſtatute will incur.

Cuſtom alledged that carrier ſhall ſafely keep goods, is not triable, for it is the common law.

NOTE: This was in *Trinity Term* laſt, and the caſe being argued again this Term, it was urged for the plaintiff in error, by BRODERICK, that the original in *Dorſetſhire* could not preſerve this right; for that a writ in one county could not maintain a declaration in another county; and for that were quoted 2. *Cro.* 654. *Palm.* 492. 2. *Rol. Abr.* 382. 2. *Cro.* 664. And a variance between the name of a place in the writ and declaration fatal, notwithſtanding the ſtatute 18. *Eliz.* c. 14. And the true difference is between the want of an original, for that is helped by the ſtatute, and a vicious original, which is not helped.

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Want of original is helped by the ſtatute, a vicious one is not.

OBJECTION. This writ is only to bring him in, and then the party may declare againſt him *in cuſtodiâ* of the warden of the *Fleet*; and this by courſe of the court; as well as in the *King's Bench*, one is declared againſt *in cuſtodiâ marſchalli*.

ANSWER.

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WER. No courſe of a court can prevail againſt the exords of an act of parliament; and the words of the ſtatute except ſuit be proſecuted and commenced within ſix years the promiſe, &c." and that muſt be unleſs ſomething be in n which a judgment can be grounded. By this practice I liver ſeveral declarations upon one original, and in the erm, and in ſeveral ſorts of actions, as debt, detinue, c.: beſides, the very court of common pleas have declared e practice, and doubted of the legality of it. 2. *Vent.* 4. Then to ſay they ſued it *ea intentione*, how ſhall that ? or ſhall it be intended it was purchaſed to proſecute this ial action? Indeed ſometimes upon another fact put in iſſue all try the intent collaterally, as in caſe of murder; but not be ſo here: *ſciens canem ad mordend. oves aſſuet.* is not ble. *Owen*, 128. 3. *Cro.* 738. Iſſue taken, that one *pers in legibus* bad, becauſe not triable. 1. *Cro.* 330. of the hamper declared that he ſued an attachment of priout of chancery *ea intentione*, that the defendant ſhould ail to anſwer debt upon a bond; and held it would not ugh petit-bag ſide be a court of record, of whoſe courſe er courts of *Weſtminſter* ought to take notice; and it npared here to the caſe in *Yelv.* 42. 2. *Cro.* 67. where a n chancery, founded on many precedents, to take one up as on a recognizance on petit-bag ſide, was adjudged ille- hich proves that ſuch courſe of courts as muſt be taken f by other courts, muſt be according to law. *Heb.* 270. nts of a court, as well as the law of a court, are founded aſon, and *tantum habent de lege quantum habent de juſ-* 5. *Edw.* 4. 115. *Dyer*, 105. 4. *Inſt.* 86. What is law and ſtatute of the realm, cannot be made good by nts or preſcription.

Scien is not traverſable.

Courſe of courts to be taken notice of, muſt be according to law.

) the bringing this writ by *Journeys Accounts*, it is plain t be, for no ſuch writ can be but where the firſt writ is l; for the time of its abatement ought to appear to the that they may thereby ſee whether the ſecond writ be ſued convenient time. 14. *Hen.* 6. 7. 6. *Co.* 10. *b.* . 4. 6. If one be nonſuited upon the firſt, * he never ve another writ *per Journeys Accounts*. *Fitz. Journ.* . 16. *Hugh. Ab.* 177. It muſt be purchaſed in reaſone, and fifteen days was the time allowed by common law; t were a caſe where an attorney might be, there muſt have ger time, becauſe he muſt give notice to his principal of ement of the writ; and ſurely if *Journeys Accounts* would , to bring the new writ fifteen months after the abatement rſt writ, would be too ſtale a proſecution; but the Judges, amination of circumſtances, are judges of reaſonable time. deſign of the ſtatute of Limitation was to prevent perhich was frequently committed by ſuffering parol evidence ment after ſix years. *Ray.* 417. 107.

Journeys Accounts cannot be but where the firſt writ is returned.

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PRATT,

HAYWARD *againſt* KINSEY.

PRATT, *Serjeant*, *contra*. FIRST, It appears the original *quare clauſum fregit* was taken out within the ſix years. SECONDLY, That it was *ea intentione* to declare in this action, for that is confeſſed by the demurrer; ſo the queſtion firſt will be, Whether the defendant might be brought into court by a *clauſum fregit*, and declared againſt in another action? We do not pretend to prove that an original in treſpaſs will maintain a declaration in caſe, but that when a defendant has appeared in treſpaſs, we may declare againſt him in caſe; and the only uſe we would make of the original in treſpaſs, is to bring him into court, and then file a new original againſt him, on which we would declare; and if this courſe be for the eaſe and advancement of juſtice, it cannot be againſt reaſon or law, for juſtice ought to be had with eaſe. And to put a poor plaintiff to the charge of a ſpecial original, before he is ſure of getting a defendant to appear, would be a hardſhip upon him, and therefore a difficulty of juſtice. And that ſuch courſe is not againſt any rule of law, appears from the like courſe's being allowed in this court, where one is brought in by a *latitat*, which in ſtrictneſs is not in the nature of an original to the action, but the declaration is it; and there is no doubt of the legality of ſuch proceedings here. And if this courſe in the common pleas be grounded upon the like reaſon and convenience, why ſhould it be queſtioned?

1. Vent. 23.

Now, whether there be ſuch a courſe in the common pleas, if there be occaſion, will be certified by the Judges of that court, who are to be preſumed to be beſt conuſant of their own cuſtoms; and by their judgment in this caſe they have ſhewed there is ſuch a cuſtom. Nor is it * neceſſary this courſe ſhould be according to the general rule of the common law; for it is ſaid in the caſes that treat of the courſes of courts, that the Judges ought to take judicial knowledge of ſuch courſes, which would be an abſurd ſaying if they were according to the common law; for it were to tell them they muſt take notice of the common law; nay ſuch courſe may be contrary to the common law, as *Lane's Caſe*, 2. *Co.* is: for it is a known rule of the common law, that no land can be conveyed to or from the king, but under the great ſeal; yet there it is held that crown land may be granted under Exequer ſeal, by the courſe of that court; and that by the word "*committimus*," a term not known to have any ſuch force by the general rules of the common law. And the reaſon given for that judgment will hold in our caſe, *viz.* the great inconveniency that would enſue by defeating the intereſt of many farmers. And here many judgments there be in the common pleas grounded upon this courſe, which may all be reverſed as well as this now in queſtion; and for avoiding of ſuch inconveniency, many precedents not maintainable in ſtrictneſs of law are allowed, leſt the property of the ſubject ſhould be made precarious.

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And as to the *Journeys Accounts*, an action brought within due time abates by the act of God, *viz.* death of party; and another is brought, which though in ſtrictneſs it cannot be called the

ame action, becauſe it is not between the ſame parties, yet in ideration of law may be well ſaid *quodammodo* between the : parties, and the very caſe where *Journeys Accounts* is allow- ; where a writ abates by the act of God, though it be be- :n the ſame parties, yet it cannot in ſtrictneſs be called the : action, for the firſt action is abated. If the firſt writ abate ugh the fault of the plaintiff, there ſhall not be a new one by rneys *Accounts*; but there ſhall where it abates by fault of the k. And though it be ſaid in 6. *Co.* . that it lies not for heir executor, becauſe not party to the firſt writ; yet ſurely that ion is not to be maintained by reaſon, to ſay, that when a t abates by the fault of the clerk he ſhall have a new writ, and when it abates by the act of God. And the law, which is *ma ratio*, ſhall never puniſh one with the loſs of his right, n there is no default in him, eſpecially ſince the writ of *Jour- Accounts* is grounded upon natural reaſon, and not upon any tive law; and though the party himſelf be dead, yet his right ives to his adminiſtrator. If a man bind himſelf * and his heir * [577] ond, and die, leaving land in fee to the heir; obligor takes writ and then dies, and afterwards the heir aliens, it would be if the executor ſhall not revive this writ, and bind the land. it were abſurd to ſay the common law ſhould be without re- againſt theſe inconveniencies.

ere is but my *Lord Coke's* ſingle opinion againſt us: ſince it ended with ſuch inconveniencies, it well becomes this Court rect it; and *Coke* does not report it as the opinion of the t, for the writ in his caſe was brought by the ſame demand- hat brought the firſt writ; ſo there was no queſtion of this , and the authorities cited do not at all warrant this opinion. 9. *Edw.* 3. 16. is againſt him; for there a writ was main- d, after great debate, by a ſucceſſor of a prior by *Journeys nts*, and it was not ſo much as objected that they were not ame parties. And many authorities are quoted by my *Lord* where the firſt writ was by ſeveral plaintiffs, or againſt al defendants, and a new writ brought by *Journeys Accounts*; et they are not the ſame parties, for ſome are dead.

BJECTION. *Clauſum fregit* in its nature cannot be continued aſt an executor; but I anſwer, That ſince the only uſe we d make of it, is to bring the defendant in to anſwer, it will voured to hinder the ſtatute from running upon us, to the de- tion of a juſt debt.

nd the deſign of the ſtatute was to ſuppreſs old rights, where arty did not proſecute his right in convenient time, which fixed to ſix years, and not to extinguiſh a right where there no default in the plaintiff: and that this was the intent of the te appears from the proviſo for the ſaving the rights of in- , perſons beyond ſea, &c. in whom there could be no laches, uſe of their diſability. And here we ſhew ourſelves under as

great

HAYWARD *against* KINSEY.

great a diſability; we are intitled to the benefit of the proviſo. If a man bring an action in an inferior court within the ſix years, and after the ſix years it is by *hab. corp.* removed hither, there muſt be new bail and a new declaration here above; ſo in ſtrictneſs here is a new proceeding here above, yet the commencing below prevents the ſtatute's being pleaded to the declaration *de novo* above. 1. *Sid.* 238. If a new promiſe be made within ſix years, the action and right is thereby ſaved, though the original contract be long before, which is the ground of the ſuit; ſo if the defendant do but own the debt within ſix years, it is evidence * [578] of a new promiſe. So in all the caſes, which are not within the miſchief of the ſtatute, the Judges have made a favourable conſtruction in aid of creditors.

Demurrer confeſſes nothing but what is materially alledged.

BRODERICK replied, that a demurrer could confeſs nothing but what was materially alledged; and it cannot be averred that *ea intentione, &c.* the writ was purchaſed. And as to *Coke's* opinion concerning *Journeys Accounts*, he quoted further *Br. Journ. Acc.* 23. *Quar. Imp.* 150. *F. N. B.* 32. c. . And at common law a *clauſum fregit* did not lie againſt an executor, but is given by the ſtatute of *Edward the Third*; and they would have a proceſs by act of parliament continued by common law; and in the caſe of the *habeas corpus* the bail below are not diſcharged till new bail be put in here.

The practice of every court muſt be taken notice of.

HOLT, *Chief Juſtice.* We are bound *ex officio* to take notice of the practice of every court in *Weſtminſter Hall*, let us be informed which way we can: the rule of a court is one thing, and an eſtabliſhed practice, of which one ſhall have avail without pleading, is another thing; and it is not the Judges of that court's ſaying, that it is the courſe of the court will determine it. Suppoſe you had pleaded a right, and a proper original in this manner that you have done here, you have not ſhewed that it ever was returned, and till return there is no day in court; and there is no continuance ſhewn to have been entered; and to prevent the ſtatute it is not enough to take out a writ, even a proper one, but all the continuances, though for ſix or ſeven years, muſt be entered, and ſo ſhewn to the Court; for if there be but an omiſſion of one continuance, it ſpoils all. Indeed where one pleads in abatement another action depending *ex eadem cauſâ*, he need not plead all the continuances, but yet he muſt ſhew the action is not determined.

But PER LUY, In this caſe it is not enough to ſay it was continued, but it muſt be ſhewn how.

But GOULD, *Juſtice*, thought it would be well only to alledge a continuance generally; but agreed, that if a continuance be not alledged, it ſhall be intended a diſcontinuance, for it is ſo of courſe; and for that cauſe the judgment was reverſed, but the Court would deliver no poſitive opinion upon the other points.

But

ut HOLT, *Chief Juſtice*, with ſome vehemence aſked PRATT, an original in *Dorſetſhire* could be a foundation for a declaration ondon? and ſaid a *Journeys Account* was a common-law writ; though a *Journeys Account* properly did not lie here, being between the ſame parties: And it were hard not to allow a vor of the firſt writ now in ſuch caſes as this, and that by conence of law * upon the ſtatute of Limitation. HAYWARD *againſt* KINSEY.

* [579]

ut for the diſcontinuance only was judgment reverſed.

The King *againſt* Daws. Caſe 966.

HE DEFENDANT being ſheriff, and having taken up a man upon an attachment (*a*), took a bail-bond from a ſufficient for his appearance.

Sheriff cannot oblige a perſon to take aſſignment of a bail-bond taken on an attachment.

S. C. Salk. 608. S. C. 1. Ld. Ray. 722. 10. Co. 93. 175. Ante, 447.

was moved by RAYMOND, that the proſecutor ſhould be com- d to take an aſſignment of the bail-bond; and this he ſaid was uently granted in the common pleas, where obligee was a cient perſon.

ut THE COURT denied the motion (*b*).

) It was an attachment out of the of king's bench againſt the defend- r a contempt. S. C. 1. Ld. Ray.

The ſheriff may take bail on an ment of privilege, on an attach- ipon a prohibition, and on attach- n proceſs. Burton *v.* Law, Stiles, 234. Say *v.* Ellis, 2. Black. Rep. 955. But all the Judges are ſaid to have reſolved, on conſideration, that a ſheriff cannot take bail on an attachment for a contempt, Anonymous, 1. Stra. 479. Field *v.* Workhouſe, Comy. Rep. 264. Studd *v.* Acton, 1. H. Bl. Rep. 468.

Anonymous. Caſe 967.

OTE. A copy of a charter under THE GREAT SEAL cannot be given in evidence, but a copy of the record thereof

Copy of charter under THE GREAT SEAL no evidence.

10. Co. 93. Say. Rep. 297. Bull. N. P. 226, 227. 2. Lev. 108.

Anonymous. Caſe 968.

E PLAINTIFF proceeded againſt the principal and bail, and the principal ordered an attorney to appear for them both; hough the bail complained againſt this, yet THE COURT d not relieve him, but bid him proceed againſt the principal, ially the attorney, being able to anſwer damages.

Plaintiff orders attorney to appear for principal and bail.

Anonymous.

Caſe 969.

Anonymous.

Venue not changed in debt.

THE COURT never changes *venue* in debt (*a*).

2. Stra. 875. 2. Term Rep. 275.

(*a*) That the Court will not change the *venue* in an action of debt on bond, except on ſpecial grounds, ſee 1. Sid. 87. 2. Stra. 878. 1. Term Rep. 781. 1. Tidd's Practice, 3.

Caſe 970.

Cudmore *againſt* Ellis.

Statute of Limitations not pleadable to a *current account*.

THE STATUTE of Limitation is not pleadable where there was a *current account*; but if it were a *ſtated account* above ſix years ago, it is pleadable to it (*a*).

Caſes Ch. 152. 2. Vezey, 400. 1. Mod. 70. 2. Mod. 312. 2. Ld. Ray. 838. 2. Burr. 1214.

Common bail is ſufficient where the action is miſconceived.

In account common bail ſuffices.

And *per* HOLT, *Chief Juſtice*, When, upon conteſt about common or ſpecial bail, it appears that the plaintiff has miſconceived his action, and that if any action lies, it is of another ſort; there common bail ought to be accepted.

(*a*) Coles *v.* Harris, Eſpin. Dig. 148. Bull. N. P. 149.

Caſe 971.

Jonſon *againſt* Meers.

What comes after *ſcilicet*, if repugnant, may be rejected.

IN this caſe IT WAS RESOLVED, where *a ſcilicet* comes, and the matter had been well without alledging what comes after the *ſcilicet*, there, if what comes after it be repugnant to what comes before, it ſhall be rejected. As here an * agreement was between the plaintiff and defendant, that the defendant ſhould ſend him ſo much of the beſt indigo by the firſt ſhip that ſhould come within two months after his arrival at *Jamaica*, and, in alledging breach, it was laid that ſuch a ſhip came from thence within two months, *ſcilicet* ſuch a day, which day is after the two months; there what comes after the *ſcilicet*, being unneceſſary, and alſo repugnant, it ſhall be rejected. So in ejectment, if one declares of a leaſe made ſuch a day, and that *poſtea*, *ſcilicet* ſuch a day, which in truth is before the day mentioned in the leaſe (*a*).

* [580]

Cro. Jac. 96.

"*Price*" and "*market price*" are the ſame.

SECONDLY, That "price" and "market price" of a thing is the ſame; for that is the price of anything for which it can be ſold.

(*a*) 2. Roll. Rep. 153. 2. Vent. 174. Yelv. 182. Cro. Jac. 154. 661. Cro. Eliz. 666. Salk. 325. Run. Eject. 218.

Caſe 972.

Warner *againſt* Green.

Excommunication pleaded in abatement, muſt only be *quouſque*.—S. C. 1. Ld. Ray. 701.

EXCOMMUNICATION in plaintiff was pleaded in abatement, with concluſion of "*petit judicium, &c. et quod defendens eat inde ſine die*" abſolutely.

And

la *respondeas ouster* awarded for two reasons: FIRST, For the sion ought to be "*sine die quousque* plaintiff were ab- d;" for upon absolution he should have a re-summons. DLY, For not having a certificate of the excommunica-). *Vide Litt.* 5. 201. 9. *Co.* 41. 8. *Co.* 62. 67. 82.

WARNER *against* GREEN.

(*a*) Lutw. 19.

Chancey *against* Win and Others.

Case 973.

RESPASS against three, for taking so many bushels of salt. defendants justified as commissioners appointed according statute 10. & 11. *Will.* 3. c. 22. s. 10. prohibiting the ation of any rock or white salt, without first weighing the efore the commissioners; and the salt in question was put rd a hoy, &c. *fore deliberand.* into such a ship *in Hibern. nd.*; the plaintiff replied *de injuriâ suâ propriâ absque tali*

De injuria sua propria a good replication to a justification under a statute.

S. C. Holt, 409. S. C. Salk. 628. S.C. 1. Ld.Ray. 700. 8. Co. 67. 1. Lev. 307. 2. Lev. 11. 3. Lev. 48. 4. Leon. 16. 2. Mod. 68. Com. Dig. "Pleader" (F. 18.).

RD objected, this general traverse was ill according to the f *Crogate's Case (a)*; for one of the rules there is, that where endant claims an interest in the thing, or where he justifies ant to another, there a general traverse of *absque tali causâ* good: For when the defendant claims a right, the plaintiff aver that he is a wrong-doer without traversing the right; ere the defendant claims no right, but only pleads matter of , without * which he would be plainly a wrong-doer, there ces for the plaintiff to maintain the wrong; and in such case *riâ suâ propriâ absque tali causâ* generally is a good replica- The second rule there is, that it cannot be when a matter rd is pleaded, for that were to put matter of fact and of l in issue. THIRDLY, It is not good when the defendant s by authority in law, for that were to involve multiplicity s in one issue, when every issue ought to be single and par- . And our case is within all these rules. FIRST, Two defendants justify as servants to the third, and so in his right his servants. And SECONDLY, The other justifies as ser- o the commissioners of excise, and by an authority derived hem. THIRDLY, This is a justification under an act of nent, which is an authority in law. And for these rules he r quoted 1. *Roll. Rep.* 47. *Hil.* 6. *Will* 3. *Roll* 1819. . 266. *Cro. Eliz.* 539. 2. *Roll. Abr.* 694. and also the o in the statute of 23. *Hen.* 8. c. 5. of Sewers; where one not guilty may give warrant of commissioners of sewers in ice; and the proviso is, that the plaintiff may give evidence *injuriâ suâ propriâ.*

* [581]

(*a*) 8. Co. 67.

EYRES,

CHANCEY against WIN AND OTHERS.

EYRES, *contra*. First, He agreed the general rule, that when the plea conſiſts of a juſtification, part depending of matter of record, the replication ought to be with a ſpecial traverſe; but that rule has its exceptions; for if matter of record be made uſe of by way of inducement to the part of juſtification, there it is not neceſſary to reply ſpecially, 2. *Leo.* 102. And that the act of parliament here was mentioned by way of inducement appears, for if it had not been at all mentioned, the plea had been as well; for being a general law, the Court would have taken notice of it. And here the act is not left to the conſideration of the jury, nor is it involved in the iſſue; and the ſole reaſon why ſuch a general replication is naught is, that the *lay gens* ſhould not be inveigled by having matter of record involved in the iſſue. And here the iſſue is not pregnant with any matter of law, as whether there be ſuch an act of parliament; but the ſole queſtion is, whether the ſalt were weighed or not? Secondly, That general rule only holds place where ſuch matter of record is pleaded, to which the plaintiff may have an anſwer; as to a *ſcire facias*, &c. but here there can be no anſwer to the act of parliament.

Vide 2. Saund. 294, 295. 1. Lev. 307.

And he agreed, That where one claims common by preſcription, rent by grant, goods by ſale, &c. and ſo juſtifies, as having intereſt, there the plaintiff muſt anſwer * directly to the title, and not with a general *de injuriâ ſuâ propriâ abſque tali cauſâ*; but when one entitles himſelf by act of parliament, eſpecially a general act, which none can traverſe, there he may well reply *de injuriâ ſuâ propriâ abſque tali cauſâ*.

* [582]

And as to the rule, that where one juſtifies by virtue of an authority in law, *de injuriâ ſuâ propriâ abſque tali cauſâ*, he ſaid the authorities cited there did not warrant it, and denied it to be law; and the caſe that moſt ſeems to favour that opinion is that in the Year-Book of *Edward the Fourth*, where the defendant juſtified the entering to ſee waſte; but there was a ſtatute merchant pleaded in that caſe, which is matter of record; and alſo *Littleton* gives another reaſon why the plea was bad, *viz.* the traverſing the intent of ſeeing waſte, which was not traverſable; but he quoted 16. *Hen.* 7. 2. where one juſtified by proceſs of *withernam*, and the general traverſe of *abſque tali cauſâ* was good. And he ſaid the third reſolution in *Crogate's Caſe* did contradict the firſt; *vide* 2. *Rol. Ab.* 694. Defendant juſtified cutting of leather, as a ſearcher appointed by an act of parliament. *Ray.* 50. *Co. Ent.* 643. A juſtification under the ſtat. *de malefactoribus in parcis*, and *de injuriâ ſuâ propriâ abſque tali cauſâ* replied.

HOLT, *Chief Juſtice*. If in treſpaſs againſt a conſtable he juſtifies for that he was a conſtable, and the plaintiff was breaking the peace, for which he committed him; may not the plaintiff reply, *de injuriâ ſuâ propriâ abſque tali cauſâ?* So if one come into my houſe, by my conſent, and he will not go away when I would have him go, I may by authority in law turn him out; if he brings treſpaſs for this, and I ſet out all the matter ſpecially in my

Vide Yelv. 137. 2 Cro. 224, 598, 599. 2. Saund. 294, 295.

juſtification, *de injuriâ ſuâ propriâ* generally will be a good ; and the caſe of entering to ſee waſte is upon a ſpecial rea- ; for ſuppoſe the plaintiff were ſeiſed in fee, the pleading *de riâ ſuâ propriâ* would involve the ſeiſin in fee in the iſſue, ich would be hard to have the right of the fee tried in an iſſue treſpaſs. If the plaintiff were leſſee, the leſſor might lawfully er to ſee waſte; and there to make him a treſpaſſer, the leſſee ght to ſhew ſome miſbehaviour in him, as cutting a tree, de- ying the corn, or ſtaying on the land all night, &c. And re is ſuch a precedent in the Entries, as you ſay, of the ſtatute *Malefactoribus*; but when one juſtifies by virtue of a war- t of a juſtice of peace, it is quite another thing, becauſe per- s it may not be proper to involve the warrant in the * iſſue. d the act of parliament here, if it had not been pleaded, would e been taken notice of by the Court; therefore its being ded being ſuperfluous, will be no hindrance to the replication, a this general traverſe (*a*).

* [583]

) Judgment was given for the plain- upon an exception to THE PLEA; namely, that it did not ſhew what kind of ſalt it was. S. C. Ld. Ray. 701.

Anonymous

Caſe 974.

OHIBITION was granted to ſtay a ſuit in the ſpiritual ourt for a ſalary of pariſh-clerk (*a*).

Prohibition to ſuit for a ſalary of a pariſh clerk.

Ld. Ray. 1507. Salk. 536. 550. 1. Burr. 367.

) A pariſh-clerk is ſaid to be an ec- ical officer as to every thing but m, Townſend *v.* Thorp, 2. Stra. But this caſe is denied, Peake *v.* , 2. Stra. 942.; and it is decided is a temporal officer, Pitts *v.* 2. Stra. 1108. Reg. *v.* Dr. Wall, od. 261. and muſt ſue in the temporal courts for his fees, Gawdy's Caſe, 2. Brownl. 48. Tarrant *v.* Haxby, 1. Burr. 367. And though appointed by the miniſter, if removed by him without ſufficient cauſe, a *mandamus* will lie to reſtore him, Rex *v.* Warren, Cowper, 370.

Anonymous.

Caſe 975.

EVANION, an antient decayed gentleman at the bar, having brought falſe impriſonment againſt an attorney of the , moved to have an attorney aſſigned him, for none would tarily appear for him; and the Court appointed one at his nomination.

An attorney appointed by the Court to appear for a perſon.

Anonymous.

Caſe 976.

N indictment for forgery was found againſt one of the officers of the Cuſtom-houſe; and a rule of Court was moved have the books of the office brought to court to be given idence at the trial.

Court will not order books to be produced at a trial.

R CURIAM. It cannot be done according to law (*a*).

ee Mr. Nolan's Note to the caſe of Rex *v.* Hoſtmen of Newcaſtle, 2. Stra. 1225.

Caſe 977. Watſon *againſt* Sutton, Marſhal of the Court.

On a *reddidit ſe* before a Judge the bail is diſcharged; but the MARSHAL is not chargeable for eſcape till notice of the *committitur*.

DEBT againſt the marſhal for an eſcape. At the trial a *reddidit ſe* in diſcharge of his bail, and a *committitur* in execution to the marſhal, was produced in evidence; and after verdict,

It was moved, that it ſhould be ſet aſide, for the *committitur* was irregular; for the courſe of the Court is, that when any one upon a render is charged in execution, there ought to be notice thereof to the marſhal, without which it were hard to charge him with eſcape; and the courſe of giving ſuch notice is by making an entry of the *committitur* in a book kept for that purpoſe by the marſhal in the office of king's bench; and the marſhal has an officer on purpoſe in the office to take notice of ſuch entries; and it is not enough that the *committitur* be entered with *Mr. Bromfield*, the entering clerk. And that was agreed by all the Clerks to be the courſe.

S.C. Salk. 272. 1. Ld. Ray. 704. Tidd's Pract 150.

HOLT, *Chief Juſtice*. Upon the *reddidit ſe* the bail are diſcharged, even upon the *reddidit ſe* before a Judge (*a*); but the principal thereupon is not in execution, till the plaintiff has made his election to have him in execution; and upon ſuch election there is a *committitur* entered in the book in the office, and the entry muſt mention it to be at the requeſt of the plaintiff; and all this is ſuppoſed to be in court, and * the *committitur* is filed with *Mr. Bromfield*. And he allowed two ways of giving the marſhal notice, the one to make an entry in his aforeſaid book, the other to carry a rule to him from the proper officer; ſo he agreed it was eſſential there ſhould be ſome way of giving the marſhal notice. But ſince this is an irregularity, whereof the defendant might have taken notice before trial, upon motion, and that he has ſlipt that opportunity, and put the plaintiff to the charge of bringing his action and trying it, it is hard to relieve the defendant; and the *committitur*, being now recorded, implies notice neceſſarily; for it is impoſſible one ſhould be committed to the cuſtody of another, and he know nothing of it. And as a man can have no *audita querela* of a matter which he had an opportunity of taking advantage of before, and had omitted; ſo here. Indeed if there were judgment againſt the marſhal for the eſcape of one in execution upon an erroneous judgment, which is reverſed for error, there would be reaſon to relieve him upon an *audita querela*, upon the ſpecial matter. But here, though it was allowed the marſhal was not chargeable without a legal *committitur*, which is not compleat till notice, and that in ſuch manner as the ſettled courſe of the Court is, *viz.* by entry in his book in the office, which is now to be taken for law; yet as this caſe ſtood it was held he came too late for relief.

* [584]

Ante, p. 567.

(*a*) But ſee Whiteman *v.* Mullens, 2. Stra. 1226.

And

ULD, *Juſtice*, ſaid, no caſe could be inſtanced where vas ſet aſide, where there had been a defence and full ?), except it were for matter diſcovered after the trial, was not; and motion was denied, though it was it upon a *reddidit ſe* of the principal, the bail has he recognizance, without any notice to the plaintiff.

No new trial to be granted where there was full defence, and except for matter diſcovered after the trial.

LT, *Chief Juſtice*, ſaid, to ſet aſide this verdict were ſteps at once. Firſt, To ſet aſide the evidence, which nd concluſive, and then the trial. And that ought no more than if debt be brought upon a judgment irreained, you can ſet aſide the judgment and action at

ULD, *Juſtice*, laid it down for a rule, that where a atter of defence, and knowing thereof goes to trial, e plaintiff to the charge of proving his iſſue, he ſhall in reſpect of that matter, have a new trial.

Where a man has matter of defence, and knowing of it goes to trial, in reſpect of that ſhall not have new trial.

rule of keeping the book for entries in the office was courſe.

(*a*) See Anonymous, ante, 567.

* The King *againſt* Bowers.

Caſe 978.

Chief Juſtice. To ſtand *in* the pillory, or *on* the pil- is the ſame thing in judgment, and both ſignify to ſtand ry (*a*).

Pillory.

idgment now is, that the " be ſet *in* and *upon* the l therefore if the under-ſhe- of the judgment by only

ſetting him *upon* the pillory, an attachment lies. Rex v. Beardmore, 2. Buſt, 794.

Sir Thomas Trevor, *Knt. Chief J*
Sir Edward Neville, *Knt.*
Sir John Powell, *Knt.* } J
Sir John Blencowe, *Knt.*
Edward Northey, *Eſq. Attorney*
Sir John Hawles, *Knt. Solicitor*

Caſe 979.

Lee *againſt* Elkins.

Award to do a thing out of a perſon's power is void.
1. Roll. Abr. 2. Kyd on Awards, 123.
3. Mod. 272, 273.

UPON an award theſe points were a Court:

FIRST, That an award, that one of the parti thing out of his power, as to deliver up a deed cuſtody of *J. S.* is void.

Award of diſtinct things may be good, and void in part.
Ante, 534.
2. Ro. Rep. 46.

SECONDLY, Where the matters awarded are d the one depending on the other, the award may b part, and void againſt the other. *Dy.* 217. *Cro. Award*, 65.

Cro. Eliz. 432. 2. Lev. 6. 3. Leon. 62. Kyd on Awards,

Breach, how aſſigned.

THIRDLY, That in that caſe the breach mu that part that is good. *Ormlad v. Coke* (*a*).

FOURTHLY, Award of a collateral thing in fat paſs good. *Cro. Car.* 216.

IXTHLY, That where the ſubmiſſion is ſimply without condi-
, award of part is good. 8. *Co.* 97.

EVENTHLY, If award be for payment of money at or before a day, it is no breach to ſay that it was not paid at the day, at or before. What is breach of award.

ut another day the Judges put the caſe at large, and deli-
d their opinions *ſeriatim* in it.

ebt upon an award bond; upon *nullum fecer. arbitr.* an award ſet forth, reciting ſeveral differences between the parties con-ing a parcel of land ſold by the defendant to the plaintiff; and parcel thereof was recovered by a ſtranger by a prior title the plaintiff; and that the plaintiff was out of pocket in de-: thereof, &c. and then all theſe controverſies were ſubmit-o them on ſuch a day, *viz.* the day of the date of the bond; hen they award, that the defendant ſhould deliver to the iff a certain deed concerning the title of the ſaid land, or he plaintiff fifty pounds in caſe of failure; that he ſhould im twelve pounds for his coſts in defending the ſuit concern-he land recovered; and alſo eleven pounds for his damage by aid recovery; and that thereupon the plaintiff ſhall give the dant a general releaſe to and upon the day of the date of arbitration bond; and breach is alledged in non-payment of aid eleven pounds, and demurrer.

An award ordering one of the parties to deliver a deed not in his power or poſſeſſion, or to pay ſuch a ſum of money, is good. S. C. 1. Lutw. 545. S. C. New Lut. 168. 3. Mod. 272.

* [586]

ne exception to this award was, That it ordered the delivery deed which was in the power of a third perſon, and there-as to that void; and the plaintiff was not to releaſe till upon ormance of all the particulars to be done by the defendant, one of them being void and impoſſible was never to be done, efore the releaſe was never to be given; *ergo* the whole award *ex parte*,

LENCOWE, *Juſtice*. The award is good, for it does not ively order the delivering up of the deed, but that the defen-ſhall do that or pay fifty pounds.

he SECOND EXCEPTION is, That the releaſe awarded to be : of "all matters, &c. to or upon the date of the award , would releaſe the very award bond, and therefore a void releaſe.

ND HE HELD the award good; for let the releaſe awarded be and even let the firſt matter awarded be likewiſe void; yet here be ſufficient in the award to make it good: for here is twelve ds awarded for coſts in defending the title; and in action for ame coſts this award will be a good plea. And again, here leven pounds awarded to be paid for the plaintiff's damage; f he is to pay it for the damage, the plaintiff is to receive and ſurely that is mutual; and the breach being aſſigned in which is well awarded, plaintiff ought to recover.

singling or each, it may be refer red to by a *prædict.*

&c. at one or more days in a certain indenture me to assign breach in non-payment, or to alledge p day, &c. in the said indenture mentioned, would b way there is to set forth the indenture, that so appear on record, and then refer to it. *Vide* 1. *Ven* 281. Debt upon bond for payment of money days and places; afterwards defendant pleads * pay *formam & effectum conditionis*; and adjudged good *gula singulis.*

* [587]

Second Exception. The release awarded ex mission, for it extends to the bond of submission. posed void for that reason, yet the award will be m out; *ergo* good. It has been often resolved, that void in part, as being only *ex parte*; yet if it be mut part, it shall be good for that part; and vide *Osbor* where it is held, that if award be of some matter w mission, and for that void, as to that part; appears by the award, that it designed both matters compence of what is to be done of the other side; ever so small a matter to make it mutual, it shall matter within the submission; but PER LUY, *durus* and that judgment was after reversed upon writ of 170. And the rule there put will not hold of the *Coke* gives it. One recovered ninety pounds dam and then the matter is submitted to reference; and that the defendant should at one time pay ten poun tiff, and that at another day he should pay him fifte that for payment another and the defendant should in a bond; this being good in part, though void fo held good; but surely that was hard, and would n day. *Vide Hard.* 399. A difference is taken, whe be done on one side is only applied to one particul other side; there, though the award be void in othe

Though award be void in part, yet if it be mutual for another part, it is good for that.

Vide ante, 129. Where a particular thing is to

applied by the award to all that is to be done of the other ſide, any of thoſe things be ill awarded, the award cannot be good or the reſt: If an award were, that one of the parties with his wife and ſon join in a conveyance to the other, and the other pay him one hundred pounds, that award is good, as to a conveyance to be made by himſelf; and if that only had been awarded for the one hundred pounds, it had been well; but ſurely ſuch award would be wholly void; for the other was to have had a title made to him from the party, his wife and ſon. And it would be unreaſonable it were that one ſhould be obliged to pay his money, and not have ch title made to him as the arbitrators deſigned; and if this award d been only mutual in this point in which the breach is aſſigned, d not throughout the whole matter in difference, it would be void thout doubt. * Firſt, Here the defendant is to deliver the plain- his writing relating to the land ſold to him by the defendant, elſe fifty pounds damages: and this is a bar to an action of de- ue for theſe writings; and the award imitates a verdict in de- ue, and judgment and execution thereupon, which would be in s manner, for the thing itſelf, if it could be; *ſecus* for damages. condly, Thing is of ſo much for coſts, which is a good diſcharge thoſe coſts; and therefore mutual; ſo is the eleven pounds for mages for the recovery. So the award is mutual throughout, d the releaſe nothing to the purpoſe. And he compared it to an ard of forty pounds for all treſpaſſes, and that the plaintiff ould releaſe all damages to time of award, which award of releaſe ould be void, and yet the award would be good. *Vide Cro. Eliz.* . *Jac.* 447. 1. *Rol. Abr.* 260. *Allen*, 85. that ordering of ſuits to ceaſe between the parties makes the award mutual.

LEE *againſt* BLEING.

* [588]

And as to the awarding the releaſes, the one, beſides what be- e is ſaid, is ordered to execute a releaſe to the other to and upon day of arbitration bond; and *ſuper performationem inde*, the er is to releaſe to him in like manner; ſo that the one is not dered to releaſe till all the matter to be done, or awarded to be ne of the other ſide, be performed. And though the awarding ch a releaſe were void, yet, if the giving thereof be ordered to before the other does releaſe, it is a condition precedent, which ght to be before the releaſe is to be made by the other; and that one of the points reſolved in *Mare and Bigle's* Caſe. But PER IV: This diverſity is to be obſerved; where an award conſiſts divers things, and one of them is void, and it be expreſsly ſaid, t upon performance of that void thing the other party ſhall do h a thing, there the doing of the void thing is a condition pre- ent, and muſt be averred, before action againſt the other for not g his part. But where there be ſeveral things in an award, ſome are good, and others not, and it is further ſaid, that upon formance *præmiſſorum* the other ſhall releaſe for the purpoſe, e it ſuffices to make averment of performance of what is well rded, without more. *Vide* 2. *Keb.* 759. 833. So here, there g ſeveral matters awarded, the *ſuper performationem inde* ſhall

Where a void thing is awarded to be done, on the performance of which another thing is to be done, it is a condition precedent, and muſt be averred.

Where ſeveral things are awarded, and on performance *præmiſſorum* the

t is to releaſe; averment of performance of what is well awarded is ſufficient. *Vide* 2. Lev. 3. acc. Ibid. 6

Per TREVOR, Award of a general releaſe ſhall not extend further than to the time of ſubmiſſion; but if award by expreſs words to the time of award,

v. Hue Allen, 51, 52. the conſequence of theſe words And though theſe words have but of late been in pleading, yet it is to very good purpoſe to put thereby the general words of an award are applied o ter ſubmitted. And if award be to pay money at a and the other ſhall give a releaſe *de præmiſſis*, it ſhal leaſe of things before the ſubmiſſion. So here, the r ters to and upon the day of ſubmiſſion ſhall be inten on that day before the ſubmiſſion.

NEVILL, *Juſtice*, agreed the plaintiff ought to h but doubted if the award were good throughout; a 109. *contra* to *Roll. Abr.* 254.

TREVOR, *Chief Juſtice*. I am not ſatisfied that t award which relates to releaſe is good; but hold th as to the reſt. Firſt, This is a releaſe to be given ant to the plaintiff at a day after the ſubmiſſion of a to or upon ſuch a day, which is the date of the arbi and thereupon the like releaſe is to be given by the defendant. Now I think the awarding the firſt rele it takes in the arbitration-bond expreſsly as can b agree with BROTHER POWELL, *de et ſuper præm* uſe in a general matter, where there is room for ſtruction, to reſtrain it to matters ſubmitted; bu are very plain and full, I deny that *de et ſuper præmi* buſineſs. As if award be, that one party ſhall on a general releaſe to the other, there *de et ſuper præm* it interpretable to be a releaſe only to the ſubmiſſion made long after; for though it be given now, it m matters long before; and in that generality of wo intended a releaſe of ſuch things as the parties that power to order a releaſe in. But here they expreſsly the releaſe ſhall work, *viz.* to and upon the day of ſu to conſtrue this otherwiſe than they have expreſsly d

ich could not be if it could be made good to the time of ſub- ſion. 1. *Ro. Ab.* 242. 1. *Ro. Rep.* 1, 2. So as to that point iffer with my BROTHER POWELL. And the preſent caſe goes ſo far as that before put, for this is not to the time of the award, only to and upon ſubmiſſion day; and the law will make no ſions of a day; and the ſubmiſſion being of all matters on that the releaſe is likewiſe ſo: ſo that if that were the queſtion, I d not give my opinion for the making it good as far as it goes the releaſe.

LEE *againſt* ELKINS.

w as to the releaſe ordered to be given by the plaintiff to the ant, that cannot be ill awarded upon the ſame reaſon that I e other ill, *viz.* that it would releaſe the award bond; for leaſe by the award is the laſt thing to be done, and then it is er though it ſhould releaſe the bond, the conditions whereof be completely performed by the giving of it. But I hold, it t be good upon another reaſon, becauſe it is to be given e defendant's performing all the parts of the award of his that is the conſideration of it, which is a matter precedent, refore ought to be firſt performed. So if any thing that is to be done by the defendant be void, it ought not to be and till it be done, this releaſe is not to be made; *ergo* never ade. So I do agree with my BROTHER POWELL in part, t if part of the award be void, yet if it be a condition pre- it muſt be performed before the other performs of his ſide; Brother's diverſity of expreſs words of reference I think will ; that is, that where the words be expreſs that upon per- of that part which is void, the other ſhall do ſuch a thing, void thing, ſays he, is a condition precedent, and muſt be but where ſeveral things are ordered, and ſome of them nd that *ſuper performationem præm.* ſuch a thing ſhall be ere, he ſays, it is enough to do that which is well awarded, titled to the thing to be done of the other ſide: I ſay, that legal part of an award is the ſame thing, to many purpoſes, were not in; but yet if it appear that the arbitrators de- that * ſuch illegal part ſhould be part of the conſideration in of which the other was to perform, it muſt be done, or elſe is not that advantage for the other ſide which was deſigned for nd he has a wrong done him by being forced to pay for a con- ation which he has not.

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2. *Lev.* 3. If it appear that a void part of award was intended as a conſideration of a thing's being done on the other ſide, it muſt be done.

Then here is a ſubmiſſion of all matters in difference; and here nention made of ſuch cauſes of demand the plaintiff has againſt defendant, and ſuch and ſuch matters ordered to be done by him liſcharge of them; and accord with ſatisfaction would be a good a in actions for them, therefore this award will,

Judgment for the plaintiff.

Simſon

1. Sid. 424.
1. Lev. 276.
Cro. Car. 472.
Carth. 330.
3. Mod. 112.
155.
Ray. 207.
Cro. Jac. 578.
Palm. 63.
Ld. Ray. 1480.
Stra. 762.

IT WAS MOVED *in arreſt of judgment*, that the entire, it muſt be intended they were aſſeſſed for b and that the ſecond words were not actionable, th were, in reſpect of the ſpecial damage; therefore t no judgment.

CURIA. It is true, if the ſecond words be though the firſt be, yet ſince damages are entire, th no judgment: BUT WE HOLD both words are actionable in this caſe, for they both prejudice the credit, he being a tradeſman, and by conſequence liv dit, and this being a trade well known, of whi great ſupport. The authorities are many as to t 1. *Ja.* 321. 1. *Cro.* 317. ſaid of a *Hamburgh* m "came a broken merchant from *Hamburgh*;" wh not ſo ſtrong by a great deal as thoſe now in queſtic they did not import that he *was* a broken mercha but *had been* ſo ſome ten years before, as appeared by and he might be a good man at the time of ſpeakin they were adjudged actionable. *Hutt.* 125. actio *a fuller* for theſe words: "Truſt him not; he ow "dred pounds, and is not worth a groat;" and b tradeſman, and that the words did tend to *his diſc held actionable, though there were other words put "me one hundred pounds;" and it might be in words meant he will not be worth a groat when he one hundred pounds; and it was not as much as ſ not able to pay the one hundred pounds. *Style*, tradeſman, "Thou art in a broken decayed co held actionable; and to ſay that one "is not wo worſe than to ſay that he is in a decayed condition. againſt us is that of 1. *Roll. Abr.* 86. an action by words, "Thou art not worth a groat; and there ment was arreſted: it was error of a judgment in a

* [592]

were worth nothing, yet he might have good credit. But in the ſame page it is held, that to ſay of one that trades, that "he is a "beggarly fellow," with averment that it was ſaid in *London*, where they did import that he was a bankrupt, was actionable. And we think the averment ſignifies nothing in the caſe, for it does not alter the nature of the words; for to ſay of a tradeſman in any place, that "he is not worth a groat," imports a ſcandal; and no body will truſt a man that is thought to be worth nothing. And the *Caſe of Bowlſworth*, "Thou art a beggarly fellow, go home 'and pay your debts," was cited; and held it was hard in nothing but the exceſſiveneſs of damages. And *Hill v. Drake (b)*, "He 'is a beggarly fellow, and not worth a groat, and not able to pay 'his debts;" which latter words, "not able to pay his debts," do not aggravate the caſe.

SIMSON *againſt* BARLOW.

By THE WHOLE COURT, Judgment was given for the plaintiff.

(b) Raym. 184.

Shaw *againſt* Bull.

Caſe 981.

ONE ſeiſed in fee of five meſſuages, by his will deviſed two of them to his wife for life, remainder to his two daughters in fee; and deviſed the third to the wife and her heirs; the fourth he deviſed to the wife and her * heirs, ſhe paying his legacies, in caſe his goods and chattels did not anſwer them all; and if ſhe did not make proviſion for the payment of his legacies in her life-time, that it ſhould be lawful for the legatee, after her death, to ſell the ſaid meſſuage to ſatisfy the legacies out of the value thereof. And then follows this clauſe, on which the doubt ariſes, "and all the "overplus of my eſtate to be at my wife's diſpoſal, and make her 'my executrix."

One ſeiſed of two houſes deviſes one houſe to *A.* and her heirs, ſhe paying his legacies, in caſe his goods and chattels were not ſufficient; and if ſhe did not make proviſion for the payment of them in her life-time, the legatee might ſell the ſame: and all the overplus of my eſtate to be at *A.*'s diſpoſal: and made her executrix. The ſecond houſe does not paſs. S. C. 2. Eq. Abr. 320. Salk. 234. 236. 6. Mod. 108.

And THE COURT delivered their opinions *ſeriatim* thus:

BLENCOWE, *Juſtice*. It appears he had five meſſuages, and deviſed four of them, and ſays nothing expreſsly, or at leaſt particularly, of the fifth; but the queſtion is, whether there be words enough to ſhew his intent was to paſs the fifth meſſuage to his wife; or if that appear to be his intent, it ought to go to her. If he at firſt had deviſed her "all his eſtate," this houſe would have paſſed to her; but compare this clauſe to the ſubſequent words, "and 'make her my executrix," it ſhews his intent was to grant her ſuch eſtate as ſhe was capable of as executrix, and that is only perſonal eſtate; ſo the ſenſe would be, "and I give my wife all the 'overplus of my perſonal eſtate, and make her my executrix." If he had ſaid, "I make my wife my executrix, and give her the 'overplus of my eſtate," that would only give her perſonal eſtate, or chattel; and will it not be the ſame thing to invert the ſentence? again, to conſider this clauſe as it ſtands with the precedent words, here is a deviſe of the fourth meſſuage to her and her heirs, paying his

Making one executor, and giving the overplus of the eſtate, gives only the perſonal eſtate.

ſubſequent words, ſhe has only the overplus of his c
if with the precedent, it will be the overplus of
money of the fourth houſe when ſold; and ſo by n
extend to the fifth houſe.

* [594]

Words which of themſelves would diſinherit an heir at law, if joined with others which make them leſs forcible ſhall be conſtrued for his benefit.

* POWELL, *Juſtice*. Uncertain words in a will carried ſo far as by them to diſinherit the heir at though there be words which of themſelves would yet if they come in company with other words, wh their natural import leſs forcible, they ought to be cor ably for the heir. And the caſe of *Bowman v. Mi* upon this reaſon; the words were, "I give all to which might include whatever he had to give, eit inheritance; yet becauſe it may be all perſonal or real or inheritance, it was taken to be too looſe and inherit an heir at law; and therefore no land did paſs. *A.* ſeiſed of *Black-Acre* and *White-Acre*, deviſed b for life; the remainder of *Black Acre* to *J. S.* in fe the fee of *White-Acre* undiſpoſed of; and then ſaid, " " wife my executrix of my goods and land;" the not paſs, though the words, according to the civil l clude it. An inheritance yet will paſs in a will by t " my eſtate;" yet they are very general, and do t nal eſtate, or a real eſtate, or both together; and th the words 'all my eſtate" are in a will," they are a governed by ſome other words in the will (*c*). A the caſe of *Jonſon v. Kerman (d)*, a deviſe of all his debts and legacies, and he was found to owe debts be the inheritance was adjudged to paſs. A man, things, deviſes his perſonal eſtate, his inheritance 1. *Mod.* 100. 3. *Keb.* 140. 145. One deviſed all h in *Dale*; if he had no other freehold in *Dale* it ſhall

(*c*) See Doe on the Demiſe of Gaſkin 3. Atk. 486. Tanne

caſe of *Reeves v. Winnington* (*a*), "I bear *J. S.* is en- SHAW
ig after my death, but I am reſolved to leave him nothing against
what his father left him, but I leave all my eſtate to my BULL.
" there the wife took all the real eſtate; and the reaſon
cauſe of the other words, which ſhew he meant to exclude
at law. In *Michaelmas Term*, in the thirty-ſecond year of
the Second, *Roll* 473. *A.* had freehold and copyhold land,
es his will in theſe words: "I give all my eſtate, of what
ſoever, not before mentioned by me, to my wife, whom I
my executrix;" and it was held, the copyhold land did
t by force of the words alone, but becauſe it appeared that
nade a ſurrender of the copyhold eſtate before to the uſe of

But here is nothing to help the words here: for, firſt,
a deviſe of his other houſes by particular words; two of
gave her * for life, with remainder over; the third to her *[595]
heirs; the fourth for her and her heirs conditionally; and
xpreſs words. And it is hard to ſay, that if he deſigned her
1 houſe, that he would attempt to paſs it by theſe general
more than he did the former houſes; eſpecially to make
ıſtruction to diſinherit an heir at law. OBJECTION. What
t by theſe words, if the fifth houſe does not paſs; it cannot
eſidue of his perſonal eſtate, for he had not enough to pay
cies; and it is plain part of them were not to be paid till after
h of the wife; for the words are, "that if ſhe in her life-
did not pay them, then the legatees might ſell;" and
e the words cannot be ſatisfied by applying them to the
of the houſe when ſold, for it was not to be ſold till after her
and to leave the reſidue of a thing not to be diſpoſed of till
r death, at her diſpoſal, ſeems unreaſonable. ANSWER. It
t appear what perſonal eſtate he might have, though he made
ıtionary proviſion for fear he ſhould not have enough; and
ıight happen ſome contingencies, for which wiſe men do
llowances in their deſigns. Beſides, it is plain he meant the
ould make proviſion for the payment of the legacies in her
e, and then ſhe might ſell the houſe in her life, and then the
would have a natural operation, *viz.* to give her the reſidue
value of the houſe. And ſuppoſe neither of theſe things
he might diſpoſe of it by her will, like one contingency of a
tion, which none know till diſtribution made.

ILL *contra*. I agree the words of a will to diſinherit an heir
nuſt be very plain and apparent in the will; but ſince men
viſe their land, as well as paſs it by deed executed, we ought
w their intent, and make it their will and not ours. It is
ı heir at law ſhall not be lightly diſinherited; and the intent
ſtator is to be gathered from the words on the face of the
But ſurely the words in queſtion are very comprehenſive,
e overplus," which relates to ſomething before, of which it
erplus; and the things gone before are a real eſtate of in-

(*a*) 3. Mod. 45. 2. Show. 249. 2. Eq. Abr. 299.

heritance;

the intent muſt be very plain; for if they ſtand indifferent to real and perſonal eſtate, ſhall not diſinherit the heir.

Cowp. 661.

circumſtances of the caſe. For if the words be i
and perſonal eſtate, or may be applied to perſonal
heir at law is not to be diſinherited by the implicati
or by any implication at all but what is a neceſ
293. Deviſe of land "paying all his debts and leg
ritance paſſes; becauſe, by the apparent intent of
perſonal eſtate was not ſufficient to pay his debts,
the neceſſity of performing his intent in payment
held the inheritance did paſs. 3. *Keb.* 45. upon
Then, upon conſideration of the parts of this will
ceſſary intent to be gathered from the ſeveral parts
fifth houſe. Firſt, It is plain the teſtator was ve
expreſſing what he would paſs in his will, and leav
conſtruction; he very particularly and expreſsly d
the four houſes, and what eſtates the deviſees ſhall
and that of a ſudden he ſhould alter his method of
about to give his wife an eſtate by general and doub
ſeems odd; and we will intend he remained conſi
able to himſelf during the whole will, and knew th
not give to the wife would go to the heir, and ther
caſion of ſaying anything of the fifth houſe, or of h
the objection, that if theſe words do not carry the
are of no uſe; I own, if that were true it were a
tion; but they are to be otherwiſe well ſatisfied
houſe is deviſed to her in nature of a truſt, liable to
legacies; and upon default in her, power is given
ſell; ſo if theſe words had not been put in, what ſh
the overplus? It would be doubtful how that would
and there are caſes on both ſides: it was a queſtion
lands are given in truſt, and money is raiſed by ſal
there is an overplus, whether that ſhall be a reſult
heir at law or for the truſtee. In the caſe of *Brew*
in *Bridgman*'s time, it was a queſtion again; and

lus; which rightly ſignifies a reſidue of ſomething before not ed of. And this reſidue, after ſale and payment of legacies, is erplus of his eſtate; and where words in a will may be ſatiſ- without carrying an eſtate from the heir at law, they ſhall be conſtrued to diſinherit him; for the heir is not to be diſ- ited at all by any implication but ſuch as are neceſſary, and ut which the words would be rejected as void, and of no ſenſe nification. And ſhe herſelf might ſell in her life-time, and ſhe was to have the reſidue; or if the legatee ſold after her , her executor ſhould have it in the right of her, and not as e, to be accountable to any.

SHAW *againſt* BULL.

d. acc. per TREVOR, *Chief Juſtice*, POWELL and BLENCOWE, *ſes.*

Wetherell *againſt* Clerkſon.

Caſe 982.

TION ON THE CASE for theſe words, "You are a whore, ' and a perjured whore," *per quod* ſhe loſt her marriage. verdict for the plaintiff,

In an action for ſaying, "You "are a whore," by which ſhe loſt her marriage, the name of the perſon who re- fuſed to marry her muſt be ſet forth.

S. C. 2. Lutw. 1295.
S. C. New Lut. 411.
1. Lev. 140.
Bull. N. P. 7.

WAS MOVED *in arreſt of judgment*, that ſhe had not laid in n with whom ſhe had loſt her marriage; for the words being ctionable, but in reſpect of the ſpecial loſs, therefore that ought ſhewed in certain, for it is iſſuable.

id though it was objected, that the jury have found loſs of mar- , and then it muſt have appeared to them, and that could have only with one; and *Hetley*, 8. was quoted for this;

t THE COURT held the objection fatal; for where the laying rticular damage is the *git* of the action, it ought to be laid lly and certainly, that the defendant may have an opportunity erſing it; and there is no caſe where the laying of particular e is neceſſary to the maintenance of the action, but it muſt be rtainly; and the opinion in *Hetley* is long ſince exploded; here the particular damages are not the *git* of the action, ly an aggravation.

uer. nihil capiat per billam.

* [598]

* Coke *againſt* Heathcot.

Caſe 983.

TE: The Court will never give leave to bring principal nd intereſt into court, and ſtay proceedings upon a bond he ſuit is upon a counter-bond, or when there is any pre- f a collateral agreement (*a*).

Principal and intereſt not brought into court on a coun- ter-bond.
2. Salk. 597.
6. Mod. 101.

e 4. & 5. *Anne*, c. 16. Tidd's Practice, 290. 3. Burr. 1370. 2. Bl. R.

Anonymous.

Caſe 984.

Anonymous.

On relief by *audita querela*, he is reſtored to all that was loſt.

1. Vent. 34. 264. 3. Mod. 249. 2. Cromp. Prac. 417

NOTE: When one is relieved by *audita querela*, he ſhall be reſtored to whatever he loſt by the judgment. And if a man has a releaſe from the plaintiff which he has not an opportunity of pleading, and brings reaſonable proof of it, the Court will relieve him upon motion, and award a *ſuperſedeas* of the execution. And upon an *audita querela* the bail generally ought to be put in in court.

Caſe 985.

Anonymous.

Cannot amend after iſſue joined.

ONE cannot amend after iſſue joined and entered, much leſs after verdict; and who diſcontinues muſt pay coſts.

Caſe 986.

Stedman *againſt* Robiſon.

In ſuit in inferior court, it muſt appear the contract was within the juriſdiction.

Ld. Ray. 795. 1040. 1555. 6. Mod. 223. Salk. 404.

FALSE JUDGMENT from a county court, where debt was by *juſticies*. The declaration was, that the defendant was indebted to the plaintiff, within the juriſdiction of the court, for goods ſold and delivered; and becauſe it was not alledged that *the contract* was within the juriſdiction, judgment was reverſed; for if one be indebted to another, he is ſo wherever he goes (*a*). *Vide* 1. *Vent.* 243.

(*a*) See Baker *v.* Holman, 1. Freem. 317. Winford *v.* Powell, 2. Ld. Ray. 1310. Waldeck *v* Cooper, 2. Wilſ. 16. Villars *v.* Cary, 6. Mod 303. Higginſon *v.* Martin, 2. Mod. 195. Stannian *v.* Davis, Salk. 404. 6. Mod. 223. Emy *v.* Bartlett, 2. Stra. 827. Trevor *v.* Wall, 1. Term Rep. 151. Rowland *v.* Veale, Cowp. 18.

Caſe 987.

Gwin *againſt* Thornborough.

Leet may amerce for a public nuſance.—See 3. Hawk. P. C. 7th edit. ch. 10. ſ. 17. and ch. 11. ſ. 4.

PER CURIAM. One cannot be amerced in a leet for a private nuſance, but may for a public.

* [599]

Caſe 988.

Roberts *againſt* Arthur.

When there is a *profert* of a deed, it remains in court all the Term.

S. C. 2. Salk. 497. S. C. Holt, 421. 36 *Hen.* 6. pl. 30.

PER CURIAM. If, upon pleading a deed, a *profert* be made of it, it ſhall remain in court all the Term, and no longer, if it be not controverted; but letters of adminiſtration ſhall not be kept in court all the Term, becauſe the * adminiſtrator may have other actions pending, and it would be a prejudice to him. *Vide* 36. *Hen.* 6. 30. And giving of *oyer* is the act of the Court, and therefore to be done by the prothonotary in his office, where now the courſe is to do ſuch things as were done in court, when the pleadings were *ore tenus* at the Bar, and an attorney ought not to do it.

MICHAELMAS TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Turton, *Knt.*
Sir Littleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Worſenholm *againſt* Manucaptors of Berks.

Caſe 989.

Capias returnable *coram rege*, one produced *coram nobis apud Weſtm.* no material variance.

CIRE FACIAS againſt bail, who plead "*no capias* againſt the principal." The plaintiff replies, and ſets forth a *capias* returnable *coram rege* indefinitely; and upon *nul tiel record* uces one *coram nobis apud Weſtm.*; and upon demurrer,

was urged by SQUIB and others, that here was a variance. *Dyer*, 153. 7. *Hen.* 4. If one plead an outlawry at the ſuit of d produce one at the ſuit of *B.* it will be a fatal variance; for were aſcertained at whoſe ſuit the outlawry was, the other reply that it was reverſed; and a *capias* returnable *coram bicunque* and *coram rege apud Weſtmonaſt.* are diſtinct ſpe- *capias.* If a plea be held before nine commiſſioners, and *a ari* come to remove the record, and the record certified be be *coram* eight, it will be a material variance; though it be ſaid, if it were before nine, *à fortiori* it is held before *quod fuit conceſſum.*

d HOLT, *Chief Juſtice*, ſaid, if a *capias* be *coram nobis ubi- craſt. Animarum* for the purpoſe, and before that day the is adjourned to *Oxford*, by that *capias* the parties have a day *ford*; but if in that caſe it were *coram nobis apud Weſtmonaſt.* arties indeed would have a day at *Oxford* by the writ of ad-

WORSENHOLM *againſt* MANUCAPTORS OF BERKS.

journment, but not upon the *capias*; and when a writ is returnable at a common day, it is always *ubicunque*; but if the Court be at *Weſtminſter* at the time of iſſuing the writ, and it be made returnable *coram rege* at a day certain it muſt be intended at *Weſtminſter*.

2. Vent. 46.

Vide 1. Vent. 233, 234. 2. Lev. 85.

But PER CURIAM, This is no material variance; and they compared it to the caſe in *Hob.* 54, 55. where a *capias* was pleaded, which being without addition is to be underſtood of an original *capias*, and an *alias capias* produced, and it was held it did maintain the plea. *Yelv.* 46. 2. *Cro.* 32. Caſe for malicious proſecution, upon an indictment *coram* ſuch and ſuch juſtices of peace, *nec non ad diverſas felonias, &c.* and in the indictment they were ſtiled only juſtices of the peace; and yet it was held well, being * the ſame in ſubſtance; ſo here; and the difference between a material and ſubſtantial variance, and what is not material; as in the caſe of a record before nine, and a record before eight removed, the variance is material; for that it was before nine is the deſcription of it, which does not agree with a record before eight. On the other hand, ſee *Bro. Abr.* "*Failure of Record*" In an aſſize the tenant pleaded a recovery againſt *J.* and produced a record of a recovery againſt *J.* and his wife, and judged good.

* [600]

A record taken before nine, one returned before eight is a material variance.

And judgment for the plaintiff.

Caſe 990.

Beech *againſt* Trevors.

Debt on recognizance, *cognovit ſe deberi* held well.

DEBT upon a recognizance in chancery; the declaration was, "that the defendant *perſonaliter conſtitut. coram rege in cancellariâ cognovit ſe deberi* in ſuch a ſum."

Cro. Car. 363.

BRODERICK excepted, that here were no obligatory words; *ſecus* if it were *debere*.

But PER CURIAM, Though it might be better ſo, yet *debetur* is ſaid paſſively; and the word *debeo* is not neceſſary to make a debt, for *teneri* or *obligari* would do. And there is no ſuch word in true *Latin* as *indebitatus*; yet it has now obtained in law:

And the plaintiff had judgment.

Oyer craved in debt in *C. B.* on a recognizance in chancery.

NOTE.—HOLT, *Chief Juſtice*, aſked the Counſel for the plaintiff, if debt were brought in the common pleas upon a recognizance in chancery, and the defendant craved *oyer* thereof, what muſt be done? for if covenants be, and bond for performance, in debt thereupon the defendant's way is to produce his part. *Vide* 1. *Sav.*

Caſe 991.

Anonymous (*a*).

What evidence will maintain a declaration.

THE plaintiff in an action on the caſe declared on an agreement made between him and the defendant, that the defendant would let him have the uſe of twelve acres of turnips for ſuch a time, for his ſheep.

(*a*) At *niſi prius*, before HOLT, *Chief Juſtice*.

The

he evidence was, that he would let him have twelve acres of ps.

ıd *per* HOLT, *Chief Juſtice*, It maintained the declaration ; ıe land did not paſs, as it would by grant of ſo ma ıy acres of re ; but it is like granting ſo many acres of corn, whereby orn only would paſs.

ANONYMOUS.

* [601]

* The King *againſt* Worſenholm and Weeks.

Caſe 992.

IEY being indicted, one of them removed it by *certiorari*, entering into a recognizance to carry it down to trial.

ID IT WAS RESOLVED, That the indictment was removed both ; and that the defendant who removed it ſaves his re- zance, by trying it as to himſelf, for that the acquittal of ; not an acquittal of the other, nor *vice verſa* ; neither can it tacted of him to enter into a recognizance to try againſt and that notwithſtanding the other defendant had appeared , and now by the removal is put without day ; wherefore if) not come in above *gratis*, proceſs of outlawry ſhall go a- : him : and for this cauſe it was, that before the ſtatute, the e was to grant no *certiorari* to remove indictments from *m* or *Middleſex*, without the defendant gave bail to try it.

Indictment againſt two, one of them removed it by *certiorari*, it is removed *quoad* both. March, 112. 2. Com. Dig. "Certiorari" (E.)

d THE CHIEF JUSTICE ſaid, it is always indorſed on the of the *certiorari*, at whoſe requeſt it is granted ; for though the king's command, yet it is at the prayer of the party ; e end of *certiorari's* is to do juſtice, and prevent vexation ›preſſion. And if two be indicted jointly, and join in plea, hall go but one *venire facias* ; *ſecus* if they ſever.

Certiorari is indorſed at whoſe requeſt it is granted.

The King *againſt* Love.

Caſe 993.

a *mandamus* to ſwear him common-council-man for the ›wn of *Cambridge*, it was returned, that he had not taken hs according to 23. *Car.* 2.

l good PER CURIAM, after arguments (*a*).

A common-council-man muſt take the oath.

Rex *v.* Slatford, 5. Mod. 317. Mayor of Oxford, 2. Salk. 429. Mayor of Abingdon, 2. Salk. 432. S. C. 1. Ld. Ray. 559. Rex *v.* St. John's, Cambridge, 4. Mod. 233. Rex *v.* March, 2. Burr. 999.

Anonymous.

Caſe 994.

E principal died before the return of the ſecond *ſcire facias* gainſt the bail, and after a *capias* returned againſt the prin-

VAS URGED, that ſince the bail would have been diſcharged idering the principal at any time before the ſecond *ſcire* returned, and that they are now deprived of that advan-

Bail are fixed by the return of the *capias* againſt the principal, tho' he died before the return of ſecond *ſcire facias* ; but they might have pleaded the death before the return. Ants, 112. 236. 1. Jones, 139.

ANONYMOUS. tage by the act of God, it were but reaſonable to diſcharge them (*a*).

But PER CURIAM, It cannot be; for it is indulgence to allow a render after a *capias* returned in diſcharge of them; and their recognizance is forfeited upon the *capias* returned againſt the principal; and the Court will only diſcharge the bail after, * [602] where they render, but * not where they cannot; but the death of the party before a *capias* returned, had been a good plea to the *ſcire facias*, and ſo was the rule (*b*).

(*a*) If a principal, pending ſuit, become a peer, Trinder *v.* Shirley, Doug. 45. or member of the houſe of commons, Langridge *v.* Flood, Tidd's Pract. 152. or be convicted and ſentenced to tranſportation, the Court will permit an *exoneratur* to be entered on the bail-piece, Wood *v* Mitchel, 6. Term Rep. 247. or the bail be permitted to deliver him to the marſhal, Peter Vergen's Caſe, 2. Stra. 1217. except he be actually on board the tranſport, Fowler *v* Deener, 4. Burr. 2034.

(*b*) See Hutchinſon *v.* Smith, 8 Mod. 240. Wilmore *v.* Clarke, 1. Ld Ray. 156. Whitehead *v.* Gale, Barnes, 108. Peregal *v.* Melliſh, 5. Term Rep. 364. and Rawlinſon *v.* Gunſton, 6. Term Rep. 284. in which laſt caſe it is determined, that if the principal die after the return of the *ca. ſa.* and before the return is filed, the bail are fixed, and the Court will not ſtay the filing of the return in favour of the bail.

Caſe 995.

Anonymous.

Writ of error cannot be quaſhed before error aſſigned.

PER CURIAM. A plaintiff in error cannot move to quaſh his writ of error before error aſſigned.

Ld. Ray. 329. Stra. 837. Sellon's Pract. 538.

Caſe 996.

Anonymous (*a*).

A perſon who had compounded an indictment for an offence of a public nature, was fined.

IN caſe for money received to the plaintiff's uſe, it appeared on evidence that the defendant had indicted the plaintiff for regrating wool; and afterwards compounded the matter with him for a ſum of money, for which money this action was now brought by the plaintiff (*b*).

And HOLT, *Chief Juſtice*, was ſo angry with the parties for compounding an indictment of a public nature, that he had the plaintiff nonſuited, and fined the defendant; but he ſaid, if it were an indictment for a private wrong they might do it.

(*a*) At *niſi prius*, before HOLT, *Chief Juſtice*.

(*b*) In what caſes an action will lie to recover back money received upon an illegal conſideration, ſee Jaques *v.* Golightly, 2. Black. 1073. Jaques *v.* Withy, 1. H. Bl. Rep. 65. Munt *v.* Stokes, 4 Term Rep. 564. and to recover money where the conſideration ariſes from an illegal act, Allen *v.* Rescous, Lev. 174. Webb *v.* Hiden, Bull. N. P 16. Featherſtone *v.* Hutchinſon, Cro. Eliz. 199.

Caſe 997.

Anonymous.

The remedy againſt factor is *account*, but if he converts, *trover* lies.

HOLT, *Chief Juſtice*. The proper remedy againſt a factor, acting as ſuch, is *account*; but if he convert, *trover* will lie againſt him.

A. finds

ds of *B.* and refuſes to deliver them to him, his r; and if *C.* happens to get them, *A.* may maintain him, but he ſhall have but one ſatisfaction; but recovered againſt *B.* *B.* may maintain *trover*

In what caſes *trover* lies.

Anonymous. Caſe 998.

ef Juſtice. The confeſſion of the party is evidence, orſe ſort of evidence.

Evidence.

Anonymous. Caſe 999.

ef Juſtice. Since the ſtatute of 14. *Hen.* 8. *c.* 5. ıation of the charter of the college of phyſicians, iſe phyſick in *London*, or within ſeven miles round ICENCE from the College; and the exception there- lify the prohibitory clauſe in it, but only orders that *England* a practiſer of phyſick muſt either have a ıe College, or be a graduate in either of the univer- ıt, he ſaid, was the ſcope of the ſtatute in few

Phyſicians not to practiſe in *London*, or ſeven miles round, without licence of the College; any where elſe muſt be a graduate, or have licence.

Ante, 386, 387.

JY, If an action be brought upon act of parlia- e ſet forth to have been held by *prorogation*, when *ırnment*, it will be fatal; and before the time of ɔarliament were by way of petition and anſwer.

Stating a ſeſſion to be *prorogued* inſtead of *adjourned* is fatal.

his ſubject Dr. Bon-). 114. Dr. Tenant's Anonymous, Palm. ıfe. 4. Mod. 47. Dr. ſod. 327. Dr Groen- 396. 1. Ld. Ray. 230. ton's Caſe, 6. Mod. Caſe, 4 Burr. Rep. 2186 to 2208. Dr. Fothergill's Caſe, 5. Burr. 2740. Dr. Stanger's Caſe, Eaſter Term, 36. *Geo.* 3. and a work publiſhed by Dr. Ferris, intitled, "A General View "of the Eſtabliſhment of Phyſic as a "Science in England, by the Corporation "of the College of Phyſicians, London," &c. &c. ſold by Johnſon.

* Anonymous. Caſe 1000.

S, whoſe huſband had left her about twelve years id carried on a trade in her own name as a widow, ipts in her own name, being ſued for a debt con- courſe of her trade, gave *coverture* in evidence, ence of her huſband's having been lately alive in

A *feme covert*, though a ſeparate trader, cannot be ſued.

RD directed the jury to find for the defendant, and

g and his Wife v. Jones, 2. Stra. 811. Ld. Ray. 1525. 1. Com. (H. 42)

Anonymous. Caſe 1001.

D. SIGIL. IN CANCELL. This Court will never ective conveyance, without conſideration; as if a y make a conveyance to another of his eſtate,

Equity will not help defective conveyance, if without conſideration.

Service of declaration.

PER CLERK, *Master of the Office.* If t attorney, a leaving a declaration in the of *ſecus* it is good (*a*).

(*a*) See 8. Mod. 379. 2. Ld. Ray. 1407. Rule of Court, Trin. 12. *Will.* 3. and Trin. 2. G tice, 230.

Anonymous.

Caſe 1003.

An indictment for ſtealing ten *pounds* in money numbered, is good.

EYRES moved to quaſh an indictment for t of *A.* to the value of ten pounds in money

And THE EXCEPTION was for the incert meant by the word "*pound*," whether pound *ſterling*.

But PER CURIAM, Pound of money is of k in law, and the term uſed in all originals: " " *reddat* B. *cent. lib.*" and ſo are the concluſi " counts, *ad damn. cent. lib. &c.*"

And he took nothing by his motion.

Caſe 1004.

When a plea begins with a *quo ad*, it is reſtrained to what that refers to, and ſhall not be extended further.

S. C. poſt. 667.

Vincent *againſt* Preſton.

PLAINTIFF declared on two ſeveral pro pounds: defendant pleads that *quoad* the fir plaintiff *actionem habere non debet*, becauſe there five pounds due at the time of ſeveral promiſes; ral promiſes were for that one fifty-five pounds, ſeveral promiſes he paid the ſaid fifty-five pound in bar of the action generally.

And PER CURIAM, If you had ſaid thus, that without the "*quoad*," it had been well; but plea to the firſt fifty-five pounds by the *quoad*, a

Cole *againſt* Acorn.

Caſe 1005.

Nil debet is a good plea in debt for money levied on a *fi. fa.*

IN DEBT againſt a ſheriff, the plaintiff declared upon a judgment obtained againſt *J. S.* and had ſued out a *fieri facias* and delivered it to the defendant, who *vi tute* thereof had levied the money. The defendant pleads *nihil debet*, and adjudged a good plea. And this difference was taken, that where the writ has not been returned, the plea is good, becauſe it is matter of fact whether he has levied the money or not; *ſecus* where the writ is returned *fieri feci*.

Cro. Eliz. 756. 1. Lev. 3. Salk 565 284. Skin. 17. Ld. Ray. 1500. 5. Com. Dig. "Pleader" (W. 17.).

Stra 701 778. 2. Wilſ. 10. Fort. 363. 367. 2. Burr. Rep. 820. 1024.

The King *againſt* Emmery.

Caſe 1006.

Perſon acquitted on information had coſts.

THE DEFENDANT having been acquitted upon an information moved for coſts, and had them; and the difference is, where the Judge, who tries the cauſe, certifies probable cauſe of proſecution, and where not (*a*).

3. Burr. 1817. 1819. Hullock on Coſts, 574.

(*a*) See the ſtatute 4. & 5 *Will. & Mary*, c. 18. Rex *v.* Woodfall, 2. Stra. 1131. Rex *v.* Davis, 4. Hawk. P C. 7th edit. ch. 26. ſ. 10 *accord* But he is not entitled to coſts beyond the extent of the recognizance, Rex *v.* Filewood, 2. Term Rep. 145. Rex *v* Brooks, 2. Term Rep. 197. and to deprive the defendant of coſts the certificate muſt be entered on the *poſtea*, Wilſon *v.* Crablington, Comb. 345.

Peters *againſt* Benning.

Caſe 1007.

Writ of error *ad proximam ſeſſionem parliamenti*, and before that time it was diſſolved, and day fixed for the meeting of a new one, and Term intervened, whether a *ſuperſedeas* of execution.

A WRIT OF ERROR *ad proximam ſeſſionem* in parliament, and before that time the parliament by proclamation was diſſolved, and day fixed for the meeting of a new one.

And upon motion THE QUESTION was, Whether this writ were a *ſuperſedeas* of execution, or even could be a warrant to ſend up the record to the new parliament, there being no Term intervening between the return of the writ and the time fixed for the parliament's meeting?

Per HOLT, The record is not removed.

And FIRST, It was * agreed on that the Court can take no notice of any extra-judicial determination or order of the lords. * [605]

If proceedings be on impeachment, and parliament be diſſolved, may proceed in another parliament.

And *per* HOLT, *Chief Juſtice*, If an impeachment be in one parliament, and ſome proceedings thereon, and then the parliament is diſſolved, and a new one called, there may be a continuance upon the impeachment (*a*); and he quoted the caſe of *James v.*

(*a*) The queſtion relative to the nature and continuance of parliamentary impeachment was very elaborately diſcuſſed in the Caſe of Warren Haſtings, Eſq in the houſe of commons on a motion made the 17th of December, 1790, and afterwards in the houſe of lords; and it was determined in both houſes, that a diſſolution of the parliament does not diſcontinue an impeachment. See a very full account of this caſe, 1. vol. of Mr. Sergeant Runnington's 5th edit. of Hale's Hiſt. Com. Law, Note (A), page 67 to 127; and "The Hiſtory of the Trial of "Warren Haſtings," Part IV. publiſhed by Debrett, 8vo. 1796.

is not tenable in parliament for two reaſons; firſt
ment ſhould be affirmed, they could not award
recognizance; ſecondly, if the parliament ſhould
any-thing done, all matter depending before the pa
thereby determined. Likewiſe a tranſcript of th
the very record itſelf, is before the lords upon a v
in that it differs from a writ of error from *Irel*
common pleas into this court, where in the on
tion is to be awarded here, but in the other caſ
the neceſſity of the thing, becauſe the king's w
Ireland; the courſe is to ſend a mandate to THE
of *Ireland* to grant execution. *Vide Jo.* 66 (*a*). t
termines error actually depending. *Ray.* 5. tha
and a whole Term intervening, is a *ſuperſedeas*
in parliament; and ſo of a diſſolution, though th
aſſigned. If before the tranſcript be left above
was diſſolved, the writ was no *ſuperſedeas* of exe
had been left above, the diſſolution would be a
but the writ of error would not be diſcontinued,
certain for the meeting of a new parliament, by
diſſolution. It may be a queſtion, if a writ of
mum parliam. when a parliament is to meet at a
ſuperſedeas, though a Term does not interpoſe bet
the writ and the time fixed for the meeting * of t
the diſſolution of the former parliament; but th
ſaid, that as the preſent caſe was, the writ in que
be an authority to carry up the record, neither co
legally poſſeſſed of it by virtue of that writ. And
of prorogation, the writ of error was returna
parliamentum; but in caſe of adjournment it v
ſeſſion.

Vide Dy. 375. 1. Jo. 66. Tranſcript of record is only before the lords in writ of error.

The king's writ runs not to *Ireland*. Ante, 225.

If writ of error be left in the lords, and there be a diſſolution, it is a *ſuperſedeas*, but the writ of error is not diſcontinued. Vide 1. Vent. 31.

* [606]

And after all here THE COURT left them to do
by law.

Paulhill *againſt* Powell.

Caſe 1008.

Whether commitment by either houſe of parliament be within the *Habeas Corpus Act*.

HE was one of the five *Kentiſh* petitioners who petitioned THE COMMONS in an inſolent manner to grant taxes, in order to ar againſt *France*; and being ordered into cuſtody of their ſer- ant, he now brought an action of the caſe againſt him for not ewing him a copy of his commitment within ſix hours after, cording to the *Habeas Corpus Act*.

And upon motion in the caſe,

HOLT, *Chief Juſtice*, ſaid, that one may, upon this act, plead *ihil debet*, and give the ſpecial matter in evidence in debt upon is ſtatute (*a*); and he ſaid THE COMMONS never commit but by ote, or a warrant under the Speaker's hand (*b*). And whether he *Habeas Corpus Act* extended to commitment by either houſe of arliament, would be examined hereafter (*c*).

A commitment muſt be by warrant in writing.

And he ſaid, one may apprehend without a warrant, but not com- nit without a warrant in writing; and the difference is between pprehending and committing, that the one is in order to the other, at is, the apprehending is in order to carry before a magiſtrate ho has power to commit.

(*a*) See 5. Com. Dig. (2. V. 6.). W. 13. 17. 43. 47.).
(*b*) See 11. St. Tr. 307. 312. 330. 323.
(*c*) See Lord Shaftſhury's Caſe, 1. Mod. 144 to 159. and 3. Hawk. P. C. 7th edit ch. 15. ſ. 73. and the caſes there collected in note page 229.

Waldegrave's Caſe.

Caſe 1009.

A declaration cannot be delivered on a *Sunday*.

DECLARATION was delivered on *Trinity Sunday*, and it was debated on motion, whether ſuch delivery were not void the ſtatute of 29. *Car.* 2. c. 7.

Cro. Eliz. 227.
1. Leon. 328.
Fort. 373.
1. Black. Rep. 526.
5. Mod. 449.
1. Ld. Ray. 705.

And *per* HOLT, *Chief Juſtice*, Strongly it is; for FIRST, It is act of neceſſity within the meaning of the ſtatute, as putting of eccleſiaſtical proceſs upon the church door (*a*), or making a ten- to ſave a penalty. And he ſaid, he would take the word proceſs" for "proceeding," and ſuch conſtruction as tends to a tter obſervation is to be made: And this declaration, as deli- red, could not be taken notice of without breaking of the *Sabbath*

* [607]

Trinity Term; for * that by the ſtatute of 32. *Hen.* 8. c. 21. gins on *Monday*; but *Quind. Paſch.* is indeed always on the nday, but is kept on the *Monday*. And PER LUY, If an arreſt a perſon, that ſkulks all the reſt of the week, be void on *Sun-*, *à fortiori* this will be.

But GOULD *et* POWIS, *Juſtices*, *dubitabant* (*b*).

(*a*) Allen *v.* Brookbank, Salk. 625. Mod. 450. Carth. 504.
(*b*) In the Hilary Term following it determined, that the ſervice of a aration in ejectment on a *Sunday* is l, Taylor's Caſe, poſt. 667. S. P. lker *v.* Town, Bar. K. B. 300. and in Eaſter Term 31. *Geo.* 3. in the common pleas, it was determined that ſervice of notice of declaration on a *Sunday* is bad, though the defendant accept it, knowing it to be irregular, Morgan *v.* Johnſton, 1. H. Bl. Rep. 628.

Anonymous.

Caſe 1010.

Anonymous.

Hands of perſons beyond ſea admitted to be proved. Ante, 521.

PER HOLT, *Chief Juſtice*, at *niſi prius*. In debt upon a bond upon iſſue of *non eſt factum*, if the plaintiff prove the witneſſes dead, beyond ſea, or that he has made ſtrict enquiry after them, and cannot hear of them, he ſhall be let in to prove their hands.

Caſe 1011.

Anonymous.

Juſtices cannot order whipping without oath made.

HOLT, *Chief Juſtice*, with indignation, aſked why actions are not brought againſt juſtices of peace who order people to be whipt in *Bridewell*, without oath made before them, or power to convict.

Caſe 1012.

Anonymous.

"Yeoman of "the Black-"Rod" is deputy to the "Uſher of the "Black Rod."

IN *aſſumpſit* for money received to the plaintiff's uſe, the queſtion at the trial was, Who was the rightful *Yeoman of the Black-Rod (a)?*

And it was ſaid he was an officer under the *Uſher of the Black-Rod*, and in nature of a deputy to him, and therefore to be nominated by him; and it was compared to the caſe of ſheriff, who alone may make his own under-ſheriff.

The office of *Uſher of the Black-Rod* is by patent.

IT WAS AGREED, that the uſher himſelf is created by the king, and is a patent officer under the Garter ſeal; and ſo is the clerk of the lords.

The grant of an office in reverſion void.

And *per* HOLT, *Chief Juſtice*, If the king grant an office to commence after the death of *A.* who has nothing in the office, it is void.

Sign manual.

NOTE: The privy ſignet, or ſign manual, is nothing but the king's ſigning his name "W. REX."

(*a*) See Sir William Saunderſon v. Bignal, 2. Stra. 747. Duppa v. Gerrard, 1. Show. 78. Comb. 163. Hob. 584.

HILARY TERM,

The Thirteenth of William the Third,

IN

The King's Bench,

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Turton, *Knt.*
Sir Littleton Powis, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

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* Ballard *againſt* Gerrard.

Caſe 1013.

Suit cannot be in the ſpiritual court for the fees of a regiſtrer.

S. C. 1. Ld. Ray. 703. S. C. 1. Salk. 333. S. C. Holt 596. 1. Mod. 167. 5. Mod. 238. 242. 4. Mod. 254. 1. Salk. 333. Skin. 589. Com. Dig. "Prohibition" (F. 5.). 2 Stra. 1108. Dougl. 629.

THE REGISTRER of a ſpiritual court libelled there for certain fees belonging to his office, as for a groat for every oath adminiſtered, and other ſmall fees accruing to him in exerciſe of his office; and proceedings carried to an excommication.

nd prohibition was moved for, upon ſuggeſtion that the office regiſtrer is a temporal office, and by conſequence matters erning the fees thereof were only conuſable at common law.

nd though it was objected to be for fees accruing for the ne- ry exerciſe of his office in court, which fees were his ſole mpence; and ſo ſmall from every particular perſon, that to put to an action at law, would be in effect to deprive him of them rely; and ſome of them may be ſuch, for which there may be emedy at law, as in caſe of the box money of this court, or fees of a door-keeper; and as to the *quantum* of them, they ſſeſſed by the Court; and any court, ancient or new, that have ſſary officers, may aſcertain fees to them, and all thoſe that uſe court ſhall be concluded thereby; and yet thoſe fees may be ſo l from each perſon, that it may not be worth while to bring an n at law for them; and it was ſaid, if one refuſe to pay the fee

of

but thus far they may go, as to judge what are reaſon
in a *quantum meruit* by the officer for ſuch fees, t
ſeſſing them reaſonable may be good, but not conc
to a jury; and ſo of the table of the uſual fees of a c
erected; and after it is once found reaſonable by
may become concluſive evidence; and ſo it has bee
the fifteenth year of *Charles the Second*, between *B*
Vide 1. Vent. 365. for the fees of the regiſtrer of the Office of Inſuranc
—However, he thought it very proper for a prohibi
ſettled judicially. And he ſaid, he would never g
mus to ſwear the regiſtrer of the ſpiritual court, or
1. Vent. 111. would put them to *an aſſiſe*. And he ſaid, it were
able to ſuffer the ſpiritual Judge to determine the ri
3. Vent. 164. ſons; and he had known an official obtain a prohibi
would ſue him in order to a deprivation below, tho
the caſe of *Sutton's Hoſpital*; and none could be c
a temporal right, by the opinion of the ſpiritual cou

And here a prohibition was awarded (*a*).

(*a*) See *accord.* Horton *v.* Wilſon, 1. Mod. 167. 1. Frem. 129. 3. Keb. 203. Johnſton *v.* Lee, Skin. 589. Johnſton *v.* Oxenden, 4. Mod. 254, 255. Johnſton *v.* I Pitts *v.* Evans, 2. Str Abr. 155. Pearſon Johnſton *v.* Oxenden, 4. Mod. 254, 629.

Caſe 1014.

Anonymous.

Feme may plead *non eſt factum.* Salk. 675.

HOLT, *Chief Juſtice.* Though a *feme covert* a deed, yet ſhe may plead *non eſt factum*, and in evidence (*a*).

(*a*) See 1. Salk. 7. Mod. Caſes, 311. 3. Term Re

Anonymous.

Case 1016.

)ANT shall have no costs upon judgment for him er in abatement (*a*).

Ante, 195. 523.

. *Will.* 3. c. 11. s. 2. Salk. 194. Ld. Ray. Extend, 6. Mod. 88. Hullock on Costs, 150. Astley v. Young, 2. Burr. 1232. Cook v. Sayer, 2. Wils. 85. 2. Burr. 753.

Anonymous.

Case 1017.

NT, if there be no tenant in possession to be served ation, the plaintiff must go the old way of signing the premises (*a*).

Ejectment when no tenant in possession.

illy's Pract. Reg. 490. 830. 1. Salk. 255. d Mr. Sergeant Run- of the Principles and and Modern, of the Legal Remedy by Ejectment, page 148. But see 4. *Geo.* 2. c. 28. Run. Eject. 155. 160. as to the mode of proceeding in the case of a vacant possession when half-a-year's rent is in arrear.

Fenwick *against* Lady Grosvener.

Case 1018.

ED against her in the spiritual court for cohabiting a marriage with her.

A citation served on a person residing occasionally in *London*, is good.

on was moved for, upon suggestion that the citation out of the diocese, it being to the ecclesiastical court *Westminster*, whereas she lived in *Chester*.

uring by affidavit, that she dwelled for a considerable e diocese, and even to the very day of the citation, ved upon her just as she was going away; THE d not grant a prohibition.

Anonymous.

Case 1019.

hief Justice. FIRST, In inferior courts the course rce an appearance by distress, and that ought to be

Appearance may be inforced by distress.

, If a *rescous* be made to a reasonable distress, the mpose a fine for it.

Steward may fine for *rescous*.

It would be too much to distrain goods to the value nanded.

Distress ought not to be to the value of the debt.

r, The officer cannot justify the breaking an house to ess.

Officer cannot break doors.

ILY, Though inferior court may grant other process ret cannot they grant *an attachment* on contempt but

Attachment for contempt must be granted in court.

Anonymous.

Case 1020. Anonymous.

Judge of *nisi prius* only assistant in writ of enquiry.

HOLT, *Chief Justice.* A Judge of *nisi prius*, upon trial of a writ of enquiry, is only an assistant to the sheriff, and has no judicial power; and if the parties come to any agreement, there the way to make it effectual is to bring it to him to sign, and afterwards move above to have it made a rule of Court.

Case 1021. Anonymous.

Lease at will may be determined by either party.

HOLT, *Chief Justice.* If one make a lease *at will* from year to year, either party may determine it at pleasure, at the end of the accruing rent to him that determines his will (*a*).

Notice must be given to determine a lease from year to year.

But if one make a lease for a year, and so from year to year, as long as both parties shall please, this is a lease for one year absolutely; and if the lessee continue on the first day of the second year, he is bound for another year; so is the lessor, if he has not warned him away before the beginning of the second year (*b*).

A parol lease for *three years* to commence *in futuro* is void.

And a lease for three years to commence *in futuro*, by parol, is not warranted by the statutes of Frauds and Perjuries (*c*).

(*a*) See Litt. sect. 68. Co. Lit. 55. 2. Bl. Com. 146, 147. 1. Sid. 339. Salk. 414. 2. Black. Rep. 1173.

(*b*) The notice necessary to determine a tenancy from year to year, is *half a year*, Dagget *v.* Snowden, 2. Black. Rep. 1224. for *six months* notice is not sufficient, Walker *v.* Constable, 3. Wilf. 22. and this notice must be to quit at the end of the year, Flower *v.* Darby, 1. Term Rep. 159. See also 2. Bro. C. C. 161. Cowp. 243. 1. H. Bl. Rep. 311. 4. Term Rep. 361. 464.

(*c*) See 29. *Car.* 2. c. 3. s. 2.

Case 1022. * Ingram *against* Foot.

A plea to an action by bill, that after the commencement of the action *M. M.* exhibited a bill and recovered judgment against the defendant as administrator, &c. and that before the said bill of the said *M. M.* the defendant had fully administered, does not shew that the defendant had administered before the commencement of the plaintiff's action.

DEBT UPON A BOND against an administrator, who pleads in bar a recognizance in such a sum entered into by his intestate at such a day, for the appearance of *J. S.* such a day in such a court, and that the said *J. S.* did not appear, whereby the recognizance was forfeited, and that his intestate was indebted by bond to *Mary Meade* in such a sum, who in *Hilary Term*, &c. *&c.* sued the defendant, and obtained a judgment against him in this court, and that he had not assets beyond what would satisfy the said two sums *tempore exhibitionis billæ præd.* Mariæ *prædict.* *unquam postea*; to which the plaintiff demurs.

And two exceptions were,

FIRST, That it appeared the plaintiff's suit was commenced in *Michaelmas Term*, before the exhibiting of the bill of the said *Mary*; and the defendant does not deny his having of other assets than which he might have wasted by *Hilary Term*.

› this it was offered for anſwer, that there was no expreſs ion made of any bill exhibited by *Mary*, but only *quod eum citâſſet*; and though that being in debt in the king's bench, ıſt neceſſarily be by bill; and though the words "*Mariæ ed.*" would tie it up to *Mary*'s ſuit in *Hilary Term*, yet ſince was no bill of *Mary*'s mentioned before expreſſly, the words d be rejected; and then it would be *tempore exhibitionis billæ*, hat muſt be the plaintiff's bill.

ıt it was ANSWERED and RESOLVED, that in truth it could efer to *Mary*'s bill, for no ſuch bill was mentioned before; hen it was worſe, for it referred to nothing; and then no is fixed when the defendant had no other aſſets.

ıd this diverſity was put by BROTHERICK, when a thing be rejected for repugnancy, and when not: When ſubſequent s make a thing, well explained and perfect before, nonſenſe, ſuch words ſhall rather be rejected, than that what was well e ſhould be made nonſenſe; but where by the ſubſequent s the thing is made good ſenſe, but altered in its nature from it was before, they ſhall not be rejected.

HE SECOND EXCEPTION was, That by the ſtatute of 4 & 5. *& Mary*, all recognizances are pardoned, except ſuch as before aſſigned to THE LORD ALMONER, and this being a ·al act of pardon, and concerning the king's revenues, there- he Court will take judicial notice of it; and here * being a ·al pardon of all recognizances, this recognizance is thereby : judged pardoned *prima facie*, if it be not ſhewn to be with- e exception; and that is to be done by them that would take ıtage of it. And if it ſhould be ſaid, that the recognizances ·ed to THE LORD ALMONER, being excepted, were not par- d even *pro inſtanti*; as in caſe of proviſo, and then the plain- being the party to take advantage of the ſtatute, ought to it:

Courts cannot take notice *ex officio* of private acts of parliament.

1 Ld. Ray. 30. 390.

1. Bl. Com. 86.

*[612]

his diverſity was taken by BROTHERICK upon that rule, that ·at will take advantage of an act of parliament with an ex- on, muſt ſhew himſelf out of the exception, *viz.* if the ex- ons be of perſons, the rule holds; becauſe the Court, upon ng of the ſtatute, cannot know whether he be the perſon ex- d or not; and therefore the party, who knows himſelf beſt in caſe, muſt ſhew himſelf out of the exception; and it is an ıtage given by the ſtatute to ſuch as are not diſabled to take it e exception: but if the exception be of offences, of which ·ourt may be informed by reading the ſtatute, he that pleads ·atute need not ſay, that it is an offence not excepted; and for ıe quoted *Noy*, 99. *More*, 619. And he urged the opinion *ph.* 93. where, upon conſideration of the ſtatute of 31. *Eliz.* . all Jeſuits are ordered to leave the kingdom on pain of high ›n, by ſuch a day, except they are retarded by ſtreſs of wea- it was held, the better way of framing an indictment thereon would

Thomas against Root.

would be to do it generally, and
within the proviſo, it being for h
in *More*, 303. Outlawry pleaded i
firſt of the queen of General h
turned, that the plaintiff, at wh
dead, and that judgment was *quò*
were exceptions in that ſtatute,
himſelf out of them; ſo there is
pleading an act of parliament upo
is directly pleaded againſt the kin

But *per* HOLT, *Chief Juſtice*,
validity of the judgment in the *ſci*
erroneous, yet was well while it

TO THIS *it was anſwered*, tha
of the king's grant to the ſubject
notice of, except they be pleaded
thorities, that he that is to take a
himſelf out of the exception of it
*[613] is to take advantage * of the ſtatu
law in this caſe; for if the act be
and without exception, the Judge
but if it has any exception or q
offences, he that would take adva
the Judges can take no notice of

HOLT, *Chief Juſtice*. If a m
lony, he may plead "not guilty,"
but if he have occaſion to plead
matter, there he ſhall not plead
evidence; as if a *ſcire facias* we
there you muſt plead the pardon.
had directed that no proceſs ſhou
doned by this ſtatute, a *ſcire*
upon this recognizance, without
And he ſaid, they could not take
with exception judicially, witho
1 Cro. 32. the act itſelf did not expreſſly ord
More, 770. many authorities, that he that ple
that he was not within the ex
3. *Inſt.* 234. Yet he could not
Vide 1. Cro. 449. very purview of the act be not
26. *Hen.* 8. 7. there be firſt general words of p
4. *Hen.* 7. 8. or exception, the natural way i
Vide 1. Vent. 234. *ſimile.* and then the king's attorney, upo
on record in the plea, to ſhew th
tion. And whereas it is urged
revenues, therefore it is a general
when an act concerns the king's
tage it is general, and judicial

: it concerns it in order to a diminution thereof to the advan- of particular perſons. And an act of parliament may be ge- in part, and particular in other part. And when an execu- eads a recognizance, he muſt ſet it forth to the Court, that ourt may ſee whether it be to be performed or not; but if it debt, they only need ſay, that a judgment was obtained againſt n ſuch a court, if it be in any of the courts at *Weſtminſter*; it be in an inferior court, they muſt give it juriſdiction, and at *taliter proceſſum fuit*, &c. INGRAM *againſt* FOOT

d here the plaintiff had judgment upon the firſt exception.

* Anonymous. Caſe 1023.

)LT, *Chief Juſtice*. One cannot ſtay proceedings upon bail-bond till other bail put in and juſtified, if excepted t. Bail-bond.

Anonymous. Caſe 1024.

)LT, *Chief Juſtice*. It will be hard to let money be brought into court upon a *quantum meruit*, and thereby to put the iff to carry on his ſuit at the peril of coſts; but the way is to ſs the employing, and that he deſerved but ſo much, and to a tender thereof, for then the plaintiff may reply that he de- l more, and ſo come to iſſue; but becauſe in moſt declarations are *quantum meruits*, even in an *indebitatus*, there it may be ht in upon the *indebitatus* count, and that will affect the ; and ſo it was done (*a*).

Money not brought into court on a *quantum meruit*, but in *aſſumpſit* may, which will affect the *quantum meruit*.

3. Lev. 440. Burr. 1120.

The rule is, that where the ſum led is a *ſum certain*, or capable of ſcertained by *mere computation*, t leaving any other ſort of diſcre- be exerciſed by the jury, it is id reaſonable to admit the defend- pay the money into court, and have ſo much of the plaintiff's demand upon him ſtruck out of the declaration. *Per* LORD MANSFIELD in Hallet *v.* Eaſt India Company, 2. Burr. Rep. 1120. But for the particular caſes in which it has been allowed or refuſed to be brought in, ſee Sellon's Practice, 1. vol. 308.

Lord Cornwallis's Caſe. Caſe 1025.

ny *Lord Cornwallis's Caſe* in chancery, which was this: The d lord, upon his intermarriage and ſettlement of his eſtate, a leaſe for years to truſtees for the raiſing of ſix thouſand ls as he ſhould appoint; three thouſand pounds thereof to be own abſolute diſpoſal, the other towards proviſion for his ger children; he in his life-time aſſigned the ſaid three thou- pounds to truſtees, for a collateral ſecurity of a leaſe of y-nine years, which he made, and that the ſaid truſt ſhould n during the term; he had one younger child; he by will notice of the new truſt for the three thouſand pounds, or- ders

If money be as a collateral ſecurity for a term, it ſhall be diſcharged in reaſonable time, unleſs a time for its continuance be fixed.

S. C. Tothil, 284.

raiſing this money, and the lady, to whoſe uſe
that a ſpeedy raiſing of it was not neceſſary, an
ſufficient eſtate out of the profits, whereof it mi
out ſale; the Court would not in that caſe decre
the time being expreſſly fixed, there muſt be a
ſhould not be then raiſed.

AND SO IT WAS DECREED; and three thou
paid to executors, and three thouſand pounds to
lease, to ſtand his ſecurity, to be laid out at int
curity as the Maſter ſhould approve of, liable to
in caſe there ſhould be no eviction.

* [615]

Caſe 1026. The King *againſt* Clark.

Information for building locks on the river *Thames*.

Noy, 103.
11. Mod. 3.
1. Lutw. 160.
3. Bac. Abr. 686.
2. Stra. 1247.
2. Hawk. P. C. ch. 75. ſ. 11. *vid.*

AN INFORMATION was filed againſt *Clark* for
on the river *Thames*, to the obſtruction of n

And *per* HOLT, *Chief Juſtice*, To hinder the
gable river is againſt *Magna Charta*, c. 23. and
gravates the fact, though not directly to the iſſue;
evidence upon it; as here the taking of money t
And it is no exception to a witneſs here, that h
carry on the ſuit, or that this public nuſance w
nuſance.

Caſe 1027. Blackborough *againſt* Davis

If adminiſtration be granted to *the grandmother* of an intestate, the Court ...

THE NIECE died inteſtate, and adminiſtration
to *the grandmother*.

And now BRODERICK, in behalf of *an aunt*, m
damus to the ſpiritual court to grant it to her.

pretended, next of kin, *viz.* a degree nearer than the grandmother. AND HE URGED, that in all caſes, except where there are many in equal degree, where the ordinary may chooſe to which of them to commit, he is bound by the ſtatute to grant it to the next of kin. And that if he grant it to any other, he goes beyond his authority, and his grant is void; and he may, without any repeal of ſuch grant, commit it to the right perſon; and for this he quoted *Owen*, 50. 1. *And.* 303. 2 *Brownl.* 119. And if there be any preſent impediment in the next of kin, as if he be attainted, *non compos*, &c. in reſpect of which adminiſtration may be well granted to the next after him; yet upon removal of ſuch incapacity, the ordinary of right is to repeal the adminiſtration, and that without any appeal to a ſuperior Judge, and grant it to the right perſon. 1. *Sid.* 373. So if he to whom it is committed become *non compos*, or otherwiſe incapable, he may repeal in like manner, and grant them to the next of kin after. 3 *Cro.* 163. *Goldſb.* 119. *Dy.* 369. So ſince now by the ſtatute of 21. *Hen.* 8. c. 5. it is the duty of the ordinary to grant the adminiſtration to the next of kin, and who ſuch next of kin is ſhall be determined by the common law, and not by their law below (*a*); and if he do not duly execute * his duty, the only remedy for the party grieved is, to apply for aid to the temporal court for the king's writ to command him to execute his authority as he ought to do, according to the ſtatute. And it cannot be objected, that ſuch *a mandamus* would in effect be to command a Judge to act contrary to his judgment, for it is no more than to command them to execute the ſtatute; and it is one of the points in the caſe in 1. *Sid* 371. that the ordinary might repeal or revoke an adminiſtration, and grant it anew.

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Vide Raym. 506.

* [616]

SIR B. SHOWERS *contra*. They are judges below of the proximity of degrees; for it were abſurd to make them judges of the matter, and not to allow them to judge it according to their own law. And there is no precedent that ever a *mandamus* went to command them to commit adminiſtration, when they had already granted it; and to ſay that adminiſtration once committed can in any caſe be merely void, is directly againſt *Packman's Caſe* (*b*). And to grant *a mandamus* here, would be to determine the right of a third perſon without his privity; for if *a mandamus* ſhould go, and the Judge below will not return the truth, here will be a third perſon ouſted of his right, without an opportunity of ſhewing it.

HOLT, *Chief Juſtice*. *Offley's Caſe* in *Siderfin* was an adminiſtration committed to one in equal degree, pending *a caveat*, without notice of him who had entered the caveat; and an appeal was brought to repeal it for that cauſe, and they below held that a good cauſe of repeal; and this was ſuggeſted for a prohibition here; and on demurrer the Court were divided, two holding, that it being granted to one next of kin, the ordinary had executed his autho-

(*a*) See 2. Bl. Com. 504. Prec. Chan. 593. (*b*) 6. Co. 19.

Blackborough *against* Davis.

rity well; but the other two, though he has granted it to the right perſon, yet it was unduly; ſo it does not affect this caſe one way or other. But here you ſeem to be too late for *a mandamus*: it is true, the conſtruction of the ſtatute upon the proximity of degrees muſt be according to the common law; and if they would go againſt it, your way would be to come and ſuggeſt that they are going to grant it to one more remote, and then move for a prohibition to hinder them from ſo doing; and then you might have a *mandamus* to make them grant it to the next of kin: nor is it unuſual to oblige them to conſtrue acts of parliament, which concern even things of pure eccleſiaſtical conuſance, according to common law, or to prohibit them. For if they ſhould libel to divorce two for kindred, who * are out of the degrees, it is very frequent to prohibit them; and yet nothing is more merely within their juriſdiction than marriage, yet becauſe there is an act of parliament in the caſe, the conſtruction whereof belongs to the king's temporal judges, we prohibit them in ſuch caſes. Now the granting of adminiſtration, in its nature, is of civil conuſance, but allowed to them by the cuſtom of *England*; and by that cuſtom they had a diſcretionary power to grant to whom they would, and to recal it at will: but here comes an act of parliament which takes away this diſcretionary power; and if they do not confine themſelves to that act, they ought to be prohibited. But now you are too late for that; for ſince they have granted it, we will give ſo much credit to them as to believe they have done it rightly; and if they have not done ſo, it muſt be undone by repeal; for ſince the ſtatute of 31. *Edw.* 3. c. 11. the adminiſtrator has as abſolute a property in the goods as an executor, who is in by the very will of the teſtator; and your authorities to the contrary are not law, for by the ſtatute of 31. *Edw.* 3 c 11. the ordinary is to grant the adminiſtration to the moſt loyal and loyal friends of the inteſtate; and nothing is ſaid of the next of kin till the ſtatute of 21. *Hen.* 8. c. 5. and that commands him to grant it to the next of kin, requiring the ſame; but neither ſtatute does incapacitate him to grant it to any other, only commands him to grant it to next of kin, &c. And if the ſtatute had deprived him of the power of granting to any other than to next of kin, then the grant to any other would be merely void; and conſequently trover would lie againſt vendee of ſuch adminiſtrator by the next of kin after adminiſtration granted to him, and that it does not, the authority of *Packman's Caſe* is in point. Suppoſe the next of kin do not aſk for it, muſt not the ordinary commit it to another, or to the principal creditor? And if after the next of kin aſk it, and the adminiſtration committed to the principal creditor is repealed, and granted to the next of kin, the principal creditor may retain any debt in equal degree; and all the diſpoſitions made by him before the repeal ſhall ſtand. But if one who has no juriſdiction commit adminiſtration, it is void, and ſale under ſuch adminiſtration alters no property, but it is utterly void; but there is no manner of authority; but here is one, though limited. And ſince you ſtaid till adminiſtration committed, your way was to appeal, and that would have

1. Vent. 188.

Vide. 13 Co. 4, 5,

* [617]

Vide 3. Inſt. 43. &c.

Hob. 83. 191. Noy, 24. 1. Cro. 62, 63. 201, 202.

Ante, p. 206.

have let you in; but now you have paſt the fourteen days, you have lapſed your time. BLACKBOROUGH *againſt* DAVIS.

And here at laſt * THE COURT directed them to bring a citation below, to repeal the adminiſtration; and if judgment be given againſt you in that, you may appeal; but ſtill ſuch appeal ſuſpends only the ſentence upon the citation, and ſtill the adminiſtration remains in force; and the adminiſtrator may by virtue thereof diſpoſe of all the goods in the mean time. * [618]

And ſo, *per* GOULD, *Juſtice*, it was adjudged in a caſe of *Sims v. Sims*, in *Hale*'s time. 2. Lev. 90.

And PER OMNES, There is no colour for *a mandamus* till ſomething be pending below, and that now can only be by citation; and if the nature of the thing will bear it, it may then be granted.

And it was ſaid by THE CHIEF JUSTICE, that after adminiſtration committed, in no caſe could the ordinary compel diſtribution; and for that the ſtatute of Diſtribution was made; and ſince the ſtatute of 31. *Edw.* 3. c. 11. the ordinary is not anſwerable for any miſdemeanor of the adminiſtrator, as he was before that ſtatute; which ſhews he is no more his ſervant, and has no more to do with him; and that adminiſtration committed to one more remote in kindred, is not avoidable but by repeal, *vide Hetly* 48. But if the ordinary, without repeal of the firſt, ſhould grant it to another, and then the firſt is repealed, from thenceforward the ſecond is good. *Sir John Nedham's Caſe* (*a*).

And THEY ALL HELD, that if there be two in equal degree, the ordinary has his election who to grant adminiſtration to.

And HOLT, *Chief Juſtice*, remembered *Sir George Sands' Caſe* (*b*), who took out adminiſtration for his ſon; and afterwards, a woman pretending to be the ſon's wife, would have it repealed; and there, upon motion for prohibition, here it was held the ordinary, by committing it to the father, had executed his authority, for he had election which of them to grant it to. As alſo the caſe of *Duncomb v. Lacy* (*c*), which was after it in the common pleas. A *feme covert* had ſeveral debts due to her before marriage, which the law did not give to her huſband; ſhe dies, and her next of kin comes and takes out adminiſtration, the huſband ſues to have it repealed, and a prohibition is moved for, and granted; and all this appearing on the declaration, it was held the prohibition ſhould not ſtand, but the huſband ought to have the adminiſtration. And *Sir George Sands' Caſe* was held to be good law, for it differed from this; for by the ſtatute of 31. *Edw.* 3. c. 11. the huſband ought to have adminiſtration preferably to anybody; and is not within the ſtatute of 21. *Hen.* 8. c. 5. becauſe the huſband is the

(*a*) 8. Co. 135.
(*b*) 1. Sid. 179. Ray. 93. 3. Salk. 22.
(*c*) Duncombe *v.* Maſon, as cited S. C. 1. Ld. Ray. 685.

* [619] beſt friend the wife can have: and it was alſo held, that a reſiduary legatee is to have adminiſtration before the next of kin, becauſe it appears, that the inteſtate, by making him reſiduary legatee, took him to be his beſt friend; but the reaſon why the wife ſhall not have adminiſtration of her huſband preferably to his father is, becauſe ſhe may marry, and ſo put herſelf and the goods in the power of another.

Vide 1. Vent. 217, 218, 219

Aunt is not nearer of kin than mother, who being in the right line is to be preferred.

And as to THE MAIN POINT, they all agreed at another day, when the caſe was moved again, and *a citatien* pending below, that there was no room for *a mandamus* to prefer *the aunt*, and that ſhe could by no means be held nearer of kin than the grandmother; and ſuppoſe them in equal degree, one being in the right line ought to be preferred to the other being in the collateral, *per* HOLT, *Chief Juſtice*.

And PER LUY, The relation between grand-daughter and grandmother, and niece and aunt are equal; and all the difference is that one is lineal, and the other collateral, and they are likewiſe mutual relations: and in pleading, if the ſon will make himſelf heir to the uncle, he muſt ſhew *comint*, and make the father a *medium*; that is, that inheritance deſcends to him *ut conſanguineus et hæredi*, *viz.* ſon of ſuch a one, who is brother and heir to the uncle. And ſo in caſe of deſcent from the grandfather, you muſt do it in like manner by the father; that it deſcends to him *ut conſanguineus et hæredi*, *viz.* as ſon and heir to the father, who is ſon and heir to the grandfather. But brother and ſiſter are in an immediate degree to one another, and for that need not mention the father in making title to each other; and for this he quoted the great caſe of *Foſter v. Ramſey (a)* in the exchequer. Two ſons of an alien, born in *England*, one of them dies, the other ſhall be his heir, and making title he need not mention the father. But though brothers are in the ſame degree among themſelves, they are not ſo as to a third perſon; for if ſo, in caſe adminiſtration had been committed to the aunt, it ſhould not be revoked, to have it granted to the mother.

Brother and ſiſter are in an immediate degree, and in making title to each other need not mention the father.
2. Jon. 10.
Vaug. 274
2. Vent. 1.

This was all in *Eaſter* and *Trinity Term* laſt.

The ſpiritual court having granted adminiſtration to the *grandmother* of an inteſtate, the court will not iſſue a *mandamus*, to grant diſtribution to *the aunt* of the deceaſed.

In *Michaelmas Term* they moved for a *mandamus* to have diſtribution; and to have it BRODERICK urged the words of the ſtatute, which ordains a diſtribution to the next of kin to the inteſtate in equal degree; and they will not controvert, but the aunt and grandmother are in equal degree to the niece. And it is plain they do not go according to the civil law, for by the *Nov.* 118. 127. of *Juſtin.* there ought to be diſtribution between the father and brother and ſiſter of inteſtate, and they never allowed of any before the ſtatute. * And we are but two degrees removed from the inteſtate, and ſo diſtant is the grandmother.

* [620] To which it was objected, firſt by *Sir B. Showers* and *Cheſhire*, common-law Counſel, That the ſtatute of Diſtribution was only

(a) Collingwood v. Pace, 1. Sid 193. 1. Vent. 413. 1. Lev. 59. 1. Keb. 65. 174 216. 535. 579. 585. 603. 670. 699. 856. Vaughan, 274. 2. Jones, 10. 2. Keb. 601. Carter, 185. 2. Sid 23. 51. 184. 2. Vent. 1. 1. Eq. Abr. 243. 3. Lev. 412.

made

made to quiet the ordinary in his right of ordering a diſtribution, which undoubtedly did belong to him, and was exerciſed by him before the ſtatute of 31. *Edw.* 3. and which he did continually claim; and according to the opinions of ſome eminent common lawyers, remained in him notwithſtanding the ſtatute. And ſince before the ſtatute they were the ſole judges who ought to have the diſtribution, and the new ſtatute impowers them to order a diſtribution, it ſeems very plain the ſtatute leaves it to them to judge who ought to have diſtribution: for it ſays it ſhall be according to the law in that caſe uſed, and that muſt be the law which they below did uſe to go by, and by their law the grandmother is nearer of kin than the aunt; or if it be not ſo, and it be adjudged ſo, the remedy is by appeal to a ſuperior court; for the diſtribution of inteſtate's eſtate was always of eccleſiaſtical conuſance before 31. *Edw.* 3. c. 11. whereby the property of the adminiſtrator is become abſolute, ſubject to debts in their degrees, but exempt, according to the general opinion of the common lawyers, of any diſtribution. And the new ſtatute, making them liable to diſtribution, does only reſtore things as they were; and a *mandamus* to grant diſtribution to the aunt, were expreſly to ouſt the judge below of the juriſdiction the ſtatute entruſts him with, *viz.* that of judging who is entitled to diſtribution; that is, of judging what are the next degrees, and next, who are in thoſe degrees. The reaſon of a *mandamus* is, that this Court, in reſpect of its ſuperintendency over all other inferior juriſdictions, is to ſee that they execute that juriſdiction that they are entruſted with; and therefore a *mandamus* to grant diſtribution to the next of kin generally, perhaps may lie, but never to do this or that particular thing; for that would directly ouſt them of the conuſance and right of judging whether the party be entitled to the thing or not; for if they ſhould judge not, and make that return to a *mandamus*, then the party might bring his action of falſe return againſt them, and the ſubject matter of their judgment below would be determined incidently here above; and if it ſhould be judged contrary to the judgment here above, a peremptory *mandamus* would go; and ſo farewell their power of judging. * And ſince the ſtatute of Diſtribution, adminiſtrator and next of kin is like executor and legatee, or rather they are executor and legatee in law. If therefore they ſhall judge who is made legatee in a will, and direct how a legacy ſhall be paid, without any particular *mandamus* of this Court; why may they not *à pari* judge who ſhall come in under the deſcription of next akin? And if the *mandamus* ſhould go, and they return that the grandmother is nearer of kin than the aunt, would an attachment go againſt them for not obeying the writ, contrary to their judgment grounded upon their law, which alone they are to be guided by, as knowing no other? And it never was heard of, that a judge entruſted with any judicial power was commanded to eat up his words, and proceed againſt his judgment; there are multitudes of precedents of appeals in ſuch caſes, but not one of either *mandamus* or prohibition; and that is evidence that

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* [621]

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hitherto appeals have been thought the ſole remedy. And by the civil law the aſcending and deſcending lines are always held nearer than collaterals: and this abſurdity that would follow, to make judges pronounce againſt their own judgments, is the reaſon that upon a writ of error the ſuperior court does reverſe judgments of inferior courts, and give new judgments, if the nature of the thing requires it. Indeed, if they would proceed below to award diſtribution to one not entitled, there might be ſome colour for a prohibition; but where a judge below is to give judgment, and it is not yet known which way he will judge, to command him beforehand to do his duty, is very odd.

And DR. LANE, *a Civilian*, ſaid, that if the father and mother of the inteſtate were living, they would be in equal degree; and by the civil law, upon death of father the grandfather becomes father in his ſtead; and the computation of degrees according to the canon law, was never received in *England* in reſpect to ſucceſſion, but only in reſpect to degrees of marriage: and he agreed, that according to the canon law the aunt and niece were in the ſecond degree, as well as the grandmother and niece; and the reaſon he ſaid was, becauſe the clergy who made the canons, conſidering the gain of diſpenſing with marriages within the four degrees, took care to make people as near akin as they could, and ſo contracted the degrees; but that according to the civil law the aunt and niece were in the third degree, and the grandmother and niece but in the ſecond degree. And before the Novels of *Juſtin. Nov.* * 118. 127. the mother was to be preferred before brother or ſiſter; and ſo ſhould the grandmother, if the mother were dead, becauſe ſhe then was *in loco parentis*; but the ſeverity of that law is corrected by thoſe Novels, and the brother and ſiſter let in in concurrence with the mother; and if the grandmother be in the ſecond degree, ſurely the grandmother's daughter muſt be a degree farther. And he ſaid, here in *England* the ancient civil law being planted by the *Romans*, and the Novels of *Juſtinian* not being found in the Weſt till the thirteenth century, they never obtained in *England*. And the ſtatute ſays, *pro ſuo cuique jure*: and what *jus* is that? Certainly it is the law by which we judge in point of ſucceſſion, and that is the old civil law; and by the civil law brothers are in the ſecond degree, for there is an aſcent to the parent of one ſide, and a deſcent from him to the brother; ſo here there will be an aſcent from the niece to her mother, and that is one degree, and from the mother to the grandmother a ſecond degree, and from the grandmother to the aunt three degrees. Before the ſtatute of 1. *Jac.* 2. c. 17. if there were father and mother having many children, and the eldeſt of the children had died inteſtate, the father or mother ſhould have had adminiſtration, and ran away with all the eſtate, and leave the brothers and ſiſters nothing; but now by that ſtatute the brothers and ſiſters are let into a diſtribution with the mother, but not with the father, for he ſhall even at this day run away with all.

* [622]

HOLT,

HOLT, *Chief Juſtice*.—By our law adminiſtration is to be committed to father or mother of the inteſtate before his brother or ſiſter, and that is the reaſon of *Ratcliff's Caſe*; and it is becauſe the child proceeds immediately from the parent, and is otherwiſe of no kin to brother and ſiſter than as they proceed from the parent; and if then the mother be nearer of kin than the ſiſter, by 21. *Hen.* 8. c. 5. ſhe ought to have the preference of adminiſtration, and by the ſame reaſon that the mother is nearer than the ſiſter, the grandmother, being nearer to the mother than her own ſiſter, the grandmother muſt be nearer to the niece than the aunt: and the words "next of kin" in the ſtatute of 1. *Jac.* 2. c. 17. ſhall be conſtrued in like manner as in that of 21. *Hen.* 8. c. 5 Before 31. *Edw.* 3. c. 11. the ordinary was univerſal adminiſtrator of all the inteſtates of his dioceſe, and then they did diſtribute to the friends of the inteſtate as they thought convenient, and ſome to holy Church; and though ſince that ſtatute they have frequently claimed ſuch a right, yet they were conſtantly prohibited *. And he ſaid, that ſurely the brother and ſiſter of the deceaſed muſt come in before the grandmother, and the aunt before the great-grandmother: and if adminiſtration were granted to the aunt, and they went about to repeal it below, in order to grant it to the great-grandmother, it were fit to prohibit them; for by the ſtatute they are bound to confine themſelves to degrees. And there are no precedents of diſtribution granted beyond children of brothers or ſiſters and neither civil nor canon law, as ſuch, are of any authority in *England*, but what gives them force, is their being received and acquieſced under here. And ſometimes in the eccleſiaſtical courts they practiſe againſt the civil law, as in ſuits againſt pariſhioners to repair the church; for of common right, and by the civil law, the parſon ought to do it.

Adminiſtration is to be committed to father or mother preferably to brother or ſiſter.

So grandmother nearer to niece than aunt.

* [623]

Brother and ſiſter nearer than grandmother, and aunt nearer than great-grandmother.

And now this Term he delivered the opinion of the Court thus:

Vide Hob. 83, &c.

WE ALL HOLD it clear law that this point muſt be determined by the law of the realm, and not by any civil or canon law whatſoever. So we ſhall go upon the ancient laws and cuſtoms of *England*; and in order to that, we muſt conſider what the ancient laws and cuſtoms of *England* were before, and at the time of the Conqueſt. And it appears, that by the law then uſed in *England*, all the deſcendants of a perſon dying inteſtate had preference not only in perſonal but alſo in real eſtates; for if a man had died, having three ſons and a daughter, they all equally inherited his real eſtate; and this appears in *Seld. Eadm.* 184. *Lamb Saxon Law*, 66. *Siquis inteſtat. deceſſerit liberi ejus hæreditatem æqualiter dividunto.* But after the Conqueſt, the kingdom and conſtitution were to be new modelled; and this alteration was made in the time of *Henry the Firſt*, and then the daughters were excluded if there were males; and it was by the thirty-ſixth law of *Henry the Firſt*, *vide Lamb.* 202,

Right of adminiſtration to be determined by the law of the land, and not by civil or canon law.

By the old law of *England*, all the children, whether male or female, equally inherited.

In *Hen* 1.'s time the daughters were excluded, if there were males.

between the reigns of *Henry* 1. and *Henry* 2. the father and mother were excluded, and to go to collaterals; but this alteration was only as to real estate.

did not continue long, but was altered between the *First* and *Henry the Second*, and the father and mo cluded; and then the law came to be adjudged as it land should not ascend to father or mother, but rathe and this appears by *Glanville, lib.* 7. 1, 2, 3, 4, *c.* teration was only made as to real estates; and pe left as they were: and father and mother, as to rence to brother or sister of the intestates, and whatever, except the descendants of him; and i remains so still, for that nothing appears in the E ration made in this point: so the law being so th alter d since, but only as to inheritance, it must main so still; and therefore the father and mothe are to be preferred before brother and sister; an of reason, the grandfather and grandmother are t fore uncle and aunt. Now as to the Authenti *Nov.* 112. c. 2. that the brother and sister sho distribution with the father of the intestate; it is was made in the latter end of *Justinian's* reign and established pursuant to the practice in the and the law there is, that if one should die int should go to his parents, excluding all others, exc sister *ex utroque parente*; but if there were no sist ter, then that it should go altogether to the father by that law, only brothers and sisters come in for but by the express words of it all others are exc grandfather, and all those above, should come in b collateral line. But I believe it will be hard to ma trine now; because the statute of Distribution giv kin, and the great-grandfather is not so near as un the grandfather and grandmother is nearer, becaus nephew, or aunt and nephew, or niece, are not othe as they derive their relation from grandfather an

where it is directed, that if a man dies, having no ſon, his daughters be his heir; if there ſhould be no daughters, his brothers; if no brothers, his father's brothers; ſo one would think the father is left out on purpoſe. But in fact it was quite otherwiſe; for notwithſtanding any omiſſion there, if one had died having no iſſue, but had a brother and a father, the father ſhould inherit to his ſon; and ſo is *Selden de Succeſſionibus apud Hebræos*, c. 12 And it is true, there is no mention in that law of the father, but by the conſtant practice the father came in before his brother, but the mother by that law never came in. And this caſe is not within the reaſon of *Juſtinian's* Novels before-mentioned; and admit it were, nothing of the civil law is admitted or obligatory here in *England*, *quatenus* it is the civil law; but if it be of any force here, it is becauſe it was anciently received here in *England*; and this law could not be received here anciently. The books of *Juſtinian* were made between five or ſix hundred years after *Chriſt*, and were received for laws during forty years after their making, and practiſed in all the *Eaſtern* Empire; his *Pandects* were in *Latin*, as the *Roman* law was, but the Authenticks were in *Greek*. And after *Juſtinian* the Second, and *Maurice* the Emperor, they were rejected for two hundred years till *Baſilick* the Emperor, who laid them altogether aſide, and made a new book of his own, called *the Baſilick* from his own name, which were in force till the taking of *Conſtantinople* by MAHOMET THE GREAT; ſo that till the year 1452, they were neglected in the *Eaſtern* Empire. In the year 1125, they were found by *Lothaire* the Second at the ſiege of *Amalcarr*, and till then were not heard of in the *Weſtern* Empire; nor was it poſſible they could, for it was for all that time overrun with the *Goths* and *Vandals*. And preſently after they were found at *Amalcarr*, they were ſent to the Univerſity of *Boulogne* to be taught. *Vide Seld.* 497. and his notes upon *Forteſcue*, 11, 12. and Dr. *Duck's* Uſe of the Civil Law, *Lib.* 1. c. 6. So that *Henry* the Firſt beginning his reign in *England* in the year 1100, and theſe laws being found in the year 1125, could not be of force in *England* in his time. But this ſeems grounded upon the *Jewiſh* law, though the ſaid twenty-ſeventh of *Numbers* may ſeem ſomewhat to the contrary; but in the caſe there put, the father and grandfather were dead. So that ſince there has been ſuch an old practice to let in the father and grandmother, preferably * to uncle or aunt; and that this is grounded upon ancient authority, which are more apparent by Books printed of late years; as *Sir Roger Twiſden's* Laws of *Henry the Firſt*, and the *Decem Scriptores*: it is fit there ſhould be no diverſity in this caſe.

Vide. 3. Co. 40. b.

The Novels of *Juſtinian* not in force in *Henry* the Firſt's time, not being then found.

* [626]

Et ſic annuente reliqua Cur. It was ruled that no *mandamus* ſhould go.

The

Caſe 1028.

The King *againſt* Biſhop.

On reverſal of outlawry, *ſcire facias* muſt go againſt all the lords mediate or immediate, or Attorney-general confeſs he had no lands.

S. C. poſt. 668. Ante, 544. Dyer, 34. 3. Sid. 316.

BISHOP was outlawed for murder; and having brought a writ of error, he removed himſelf by *habeas corpus* from *Newgate*; and being aſked what he had to ſay why execution ſhould not be awarded againſt him, he prayed an allowance of his writ of error, and it was allowed; and then he prayed a *ſcire facias* againſt all the lords mediate and immediate; and becauſe the Term was ſo far ſpent, that he could not have it returnable till the next, the Court told him, that if he got THE ATTORNEY-GENERAL to confeſs that he had no lands, &c. it would ſuffice; and he was committed to the marſhal.

2. Salk 495. 4. Hawk. P. C. 7th edit. ch. 50. ſ. 14. page 502.

Caſe 1029.

Crow *againſt* Maſon.

A declaration of *Michaelmas Term*; the defendant pleads payment as to part *ſince the laſt continuance*; the plaintiff demurs; it is a diſcontinuance.

2. Jones, 129.

DEBT UPON A BOND. The defendant pleads in bar, as to part, that *after the laſt continuance* he had paid ſo much, which the plaintiff accepted; to which the plaintiff demurs; and it being a declaration of *Michaelmas Term*, IT WAS ADJUDGED the whole was diſcontinued; for the plaintiff's way had been to demur to the plea, ſo far as it was pleaded, as he had cauſe to do, it being *after the laſt continuance*, and no acquittance pleaded or produced; and take judgment by *nil dicit* as to the reſt. PER. CUR.

Clift, 630. Moor, 871. Hob. 81. Fort. 338.

Caſe 1030.

The King *againſt* Clerk.

In information for nuſance, by conſent jury to have view.

IN INFORMATION for a public nuſance, the jury found the defendant guilty; yet becauſe it appeared to the Court to be doubtful upon the evidence, and that the jury had not had the view, though very proper in this caſe, they wiſhed the parties to conſent to let this jury have the view, and to come to trial again; and it was ſo done by conſent. And this the Court did becauſe it was a queſtion of right, and this trial would be peremptory to the defendant.

* [627]

Caſe 1031.

* The King *againſt* Plummer.

Several perſons being met to do an unlawful act, one fires a gun and kills one of his own party, it is not murder.

S. C. 1. Kely. 109. Keilw. 161. Dougl. 202. Foſt. C. L. 3. Caſes in C. L. 7.

INDICTMENT FOR MURDER, and a ſpecial verdict. Eight perſons having a deſign to tranſport great quantities of wool, contrary to law, were with horſes laden with the ſaid wool on their way towards the ſea-ſide. At twelve of the clock at night, the king's officers duly appointed, having notice thereof, in order to ſeize the wool and apprehend the ſaid eight perſons, came and waylaid them in a certain lane through which they were to paſs, and hearing them coming gave the word of ſeizure; whereupon one of the ſaid eight perſons, having a fuſee laden with powder and ball in his hand, fired it off, and killed *J. S.* one of his own gang, *viz.* one of

of the ſaid eight perſons. The defendant was one of the ſaid eight perſons, and preſent at the diſcharging of the ſaid fuſee. THE KING *againſt* PLUMMER.

The queſtion was, Whether it be murder in him?

And HOLT, *Chief Juſtice*, declared, that foraſmuch as this caſe ſeemed of very great conſequence, it had been for two Vacations under the conſideration of all the Judges of *England*, before whom it had been ſeveral times argued at *Serjeants Inn*, in *Chancery Lane*; and that upon very great deliberation they had all unanimouſly reſolved, that it is not murder in him. And now he openly in court declared the reaſons of their reſolution, to this effect:

FIRST, It is to be conſidered, that it does not appear anywhere in the verdict that the perſon who did ſhoot off the fuſee did ſhoot it againſt any of the king's officers; for if that had been found, it had been murder in them all; but that being not found, we cannot intend it; though upon the circumſtances of the evidence, as it did appear, there was enough for the jury to have found ſuch a verdict. For FIRST, they were doing an unlawful act; SECONDLY, they were armed; THIRDLY, it was late at night, and the fuſee was diſcharged upon the word of ſeizing's being given; and it cannot be eaſily thought that it was diſcharged upon one of their own gang, and not againſt the king's officers, upon this evidence, and theſe circumſtances. But this is matter of evidence for a jury to find the fact, and not for Judges to intend it here upon a ſpecial verdict; and therefore, though it might be a good foundation for a verdict, it cannot be ſo for an intendment. For in a ſpecial verdict, whereby any man is to be charged, or hurt, or convicted, though the jury find matter of evidence enough for them to find the fact, and give * verdict againſt him, yet if they do not find the fact, I ſay ſuch matter, though pregnant evidence, yet it cannot be enough to impower the Judge to intend the fact, or condemn him as guilty of it. And ſo here, though there be great evidence to prove that the fuſee was diſcharged againſt the king's officer; yet becauſe it is poſſible it might be by chance, or other misfortune, we muſt rather intend it to have been fired upon ſome other occaſion than againſt the king's officer.

If it had been found he had ſhot at any of the king's officers, it had been murder.

Fact itſelf muſt be found, not evidence of it.

* [628]

SECONDLY, So there be two things to be conſidered in this caſe: FIRST, The fuſee's not being ſhot off againſt the king's officers, but rather upon ſome other account, what crime is it in him that diſcharged it? SECONDLY, If it be murder in him that did ſhoot it, it will be fit to be known what crime it will be in them who were preſent of his ſide, and how far they will be concerned in it?

FIRST, It is plain, that he that did diſcharge it, and all the reſt, were engaged in an unlawful act and deſign; and if he, in purſuance of that, diſcharged the fuſee, though he had not killed the perſon intended, but another, the offence would be in the ſame degree as if he had killed the perſon he intended to kill. *Vide Dy.* 128. *pl.* 16.

Note, If a man ſhoots, intending to kill one man, and kills another, it is murder.

Crompt.

the act be done, any more, it muſt be underſtood that he did

it ſhall be intended voluntarily, being done by man, a free agent.

laid in the indictment, if the contrary do not
free agent, and what he does muſt be intende
rily, if the contrary does not appear. And in
is indicted of murder or manſlaughter, if it ap
the fact was done by misfortune, *it muſt be ſo*
jury. And if it be not ſo found ſpecially, but
rally, it muſt be intended that he did it *with h*
quently it muſt be intended, that this act in q
luntarily, and therefore, as the caſe is, it mu

* [629]

* But ſuppoſe it had been found by the jury,
diſcharged the fuſee did it of malice prepenſe, a
gang is killed, it could not affect any of the
for though they are all engaged in an unlawful

In general, if two are engaged in an unlawful act, and a man is killed by one, the other is guilty of murder.

that the general notion be, that when two are
lawful act, and that by the act of one a man is k
der in the other; though he has done nothing,
nally engaged in the unlawful act, it makes hi
And this, it is true, is a general received opinio
qualifications and limitations.

But to make it ſo, he ſhould know of that malicious deſign different from that engaged in, elſe it is not murder

FIRST, To make one an abettor in ſuch a c
he ſhould know of the malicious deſign, that is,
ful; for if he be ignorant of the deſign, though
the unlawful act foreign from the deſign, he ſha
murder: for it is poſſible, that if divers perſon
unlawful act, that one of them may have a partic
another of them, and the reſt know nothing of i
the opportunity of putting that malice in execu
others are engaged in an unlawful act, cannot m
for it would be extremely hard to make any of the
collateral act, to the malice whereof they were n
14. *Jac.* *Hale*, *tit.* "*Murder*," *pl.* 101. *C*

A. has malice to *B.* and engages in a duel with him; *A*

a company of thieves go upon a deſign to rob a houſe, or to rob on the highway, and two of them quarrel, and one kills the other, and that there was no malice prepenſe, but a ſudden quarrel, it is only manſlaughter in him, and no crime at all in his companions, though they were all engaged in an unlawful act. And he quoted a caſe which happened on evidence at THE OLD BAILEY, in *December* 1664. The ſecretary of ſtate made his warrant to apprehend divers ſuſpected perſons, directed to the meſſengers; the meſſengers, having notice of their being in ſuch a houſe, took ſeveral ſoldiers with them to aſſiſt them to apprehend the ſaid perſons, but took no civil officer with them, neither did they make any demand to have the door open, as they ought by law to do, but broke * open the door; and when they had broke open the door, ſome of the ſoldiers fell a-plundering, and ſtole away ſome goods; and the queſtion was, Whether this was felony in them all? That they were all engaged in an unlawful act is plain, for they could not juſtify breaking a man's houſe, without making demand firſt; and in that caſe, all thoſe who were not guilty of the ſtealing were acquitted, notwithſtanding their being originally engaged in one unlawful act of breaking the door; and the reaſon was, becauſe they knew not of any ſuch intent, but it was a chance opportunity of ſtealing, whereupon ſome of them did lay hands (*a*).

If thieves go to rob, and quarrel, and one of them is killed, it is not murder in the reſt.

* [630]

Perſons joined to break open a door without warrant, ſome commit robbery, it is not robbery in all, becauſe they did not know the intent.

SECONDLY, The act of one, whereby death doth enſue, muſt be in purſuance of the original unlawful act. Now in the principal caſe, it does not appear *that J. S. was killed in purſuance of the original unlawful act*, but that another took this opportunity to kill him. Divers come to hunt in a park, and the keeper comes and commands them to ſtand, and would arreſt one of them, and they reſiſt, and one of them in the ſcuffle kills the other, it is murder in them all, becauſe they were doing an unlawful act, and would not ſtand but reſiſted, and in purſuance of that unlawful act a man was killed. 2. *Roll. Rep.* 120. *Palm.* 30. and the *Lord Dacre's Caſe* (*b*). But if divers had come into a park to hunt, where they have no right to hunt, and immediately after two of them quarrel, and one of them kills the other, it is only manſlaughter in him that kills, and no offence in the reſt, becauſe the killing was not in purſuance of the unlawful act that they were all engaged in. And it might be in this caſe, that he that did kill *J. S.* had a private grudge to him, and took this opportunity of putting it in execution; and there was ſome evidence, that the man that killed *J. S.* here did ſuſpect him to have diſcovered the deſign, and thereupon killed him; and this perhaps the reſt knew nothing of; and it would be very ſevere that they, who were not privy to that malice, ſhould be guilty, if the knowledge of this malice lay hid in the breaſt of him who did the act. Wherever divers are concerned in a riot, or other unlawful act, and in carrying it on one is killed, though it be by chance, it will be murder in all. *Dy.* 128. Divers

The act of one, whereby death follows, muſt be in purſuance of the original unlawful act.

Vide Sav. 67.

If ſeveral go into a park to hunt where they have no right, and two quarrel, and one is killed, it is only manſlaughter, becauſe the killing was not in purſuance of the unlawful deſign.

Where divers are concerned in a riot, and one is killed, it will be murder in all.

(*a*) See Rex *v.* Hodgſon and Others, caſes in Crown Law, 6.

(*b*) 1. Hale, 439. 443. 445. Foſter's C. L. 354.

perſons

because he would not let him kill another; an
had as much a murderous intent as *A.* had, tho
for *A.* and *C.* had a reciprocal malice againſt on

The unlawful act ought to be deliberate.

THE THIRD QUALIFICATION to the rule i
act ought to be deliberate; for if it be done of
occaſioned by purſuance of it will not amount
poſe a ſudden quarrel happens between ſeveral p
peace is broke, and a conſtable comes to part
tinue on for a time, and will not obey the conſ

If on a fray conſtable is killed in the execution of his duty, if he is not known to be a conſtable, it is not murder.

ſtable is killed in the fray; yet if they did not
conſtable, and that he came to keep the peace,
take notice of the occaſion of his coming, it will
ter in him that kills, and no offence in the reſt.
ſolved at THE OLD BAILEY, at the ſeſſions afte
the nineteenth year of *Charles the Second*. in or
He and his wife fell out, and were fighting;
they lodged came to part them, and to keep th
with great force, took him and flung him upo
ſtood in the chimney, and broke his rib, where
was held to be but manſlaughter, becauſe, that th
an unlawful act, and that the landlord, or any o
authority to keep the peace as if he actually were
the killing of one who comes to command the pe

If a perſon who declares he comes to keep the peace be killed, it is murder.

no conſtable, is as much murder as to kill a conſta
had declared that he was come to keep the peace,
them to keep the peace, whereby they might t
cauſe of his coming, and notwithſtanding that the
it would be murder; yet this not being ſo, it was

If in a deliberate riot, without ſuch declaration, it is murder if the man be kil-

ter, becauſe the original quarrel was ſudden. B
deliberate riot, whether he knew him to be a con
that he came to keep the peace or not, if he kill a
that reſiſts him, it will be murder in him, and all t

ouſe to ſearch for the dog, and *A.* refuſes him entrance, and the ther preſſes in, and being oppoſed in the ſcuffle kills *A.*; and it was eld here at the Bar to be only manſlaughter; yet *B.* was doing an nlawful act, *viz.* entering into a man's houſe againſt his will; nd *A.* was killed in purſuance of ſuch unlawful act; and the only eaſon of that reſolution muſt be, becauſe the unlawful act in which *B.* was concerned was a ſudden one, and without deliberation. nd *Hale's Pl. Cor.* 51. 57. inſiſts very much upon it, that the nlawful act muſt be with deliberation, otherwiſe the killing cannot be murder.

The deliberate act ought to be to do hurt to ſomebody.

In THE FOURTH PLACE, As the unlawful act ought to be ith deliberation, ſo it ought to do hurt to ſomebody, either immediately or conſequentially, otherwiſe the killing will not be murder. alt. 218. *Br. Cor.* 171. *Stamf.* 40. *Hale*, 51. 57. that the nlawful act muſt be deliberate, and mediately or immediately nding to hurt ſomebody. A man goes to ſhoot a deer in another an's park, and the arrow ſtriking againſt a tree glances and kills man, it can be no more than manſlaughter; though 3. *Inſt.* 56, 7. be to the contrary, becauſe it is an unlawful act.

If it be with an intent to do a felonious act, though not againſt a perſon, it is murder.

In THE FIFTH PLACE, It is fit to be known, in relation to that le, that it muſt be a deliberate unlawful act, tending, mediately or mediately, to the hurt of ſome perſon: what if it do not tend to art any perſon? yet if it be unlawful it will be manſlaughter. gain, though it be not with deſign to hurt any perſon, yet if it be ch an unlawful act as is felony, or carried on with a felonious tent, and in purſuance of ſuch act a man is killed, ſuch killing is urder, not only in him by whoſe hand the perſon falls, but alſo in l thoſe concerned in the felonious intent. As if divers agree to b a houſe, and ſome of them are placed in a paſſage leading to the ouſe to watch for the reſt, and the others go to rob the houſe, and perſon happens to come by, who is ſtopped by thoſe placed in the ſſage, and in the ſcuffle is killed by one of them, and no robbery committed, yet this will be murder in all thoſe that were by then, d likewiſe in all thoſe that went to rob the houſe, and were not ually preſent. 3. *Inſt.* 56. A man goes to ſhoot another man's and chances to kill a man, it is murder, ſays the Book; but muſt be intended that he * ſhot the hen with intent to ſteal and then, becauſe a felonious intent was at bottom, it will be der, otherwiſe that caſe cannot be law.

* [633].

o firſt WE ALL AGREE, That though the perſon that ſhot off fuſee did it with intent to kill *I. S.* out of a premeditated ce he had againſt him, yet ſuch as did not know of ſuch de- though preſent at the time, and engaged in an unlawful act him that did diſcharge the fuſee, cannot be guilty of murder.

CONDLY, WE ALL AGREE, That if it were found that the had been diſcharged in oppoſition to, or againſt any of the 's officers, and thereby the ſaid *I. S.* is killed, it would be

THE KING *v.* PLUMMER.

murder in them all; ſo that being not found, we cannot intend it.

Therefore the priſoner muſt be acquitted (*a*).

(*a*) See Mr. Juſtice Foſter's Obſervations on this caſe, Foſter's C. L. 351, 352.

Caſe 1032. The Pariſh of Godſtone *againſt* The Pariſh of Eaſt Grinſtone.

A reſpondent pariſh, on an order of removal being quaſhed, cannot remove the pauper again until he is returned.

AN ORDER OF TWO JUSTICES for the removal of a poor perſon was quaſhed at the quarter-ſeſſions; and before the poor perſon came back, the pariſh, whoſe order was quaſhed, made a new order to fix him in another place.

And PER CURIAM, It cannot be good, becauſe a new order ought not to be made till the party were come back; and if that order had been confirmed here, it would not make it good, becauſe it was merely void.

Caſe 1033. Anonymous.

Money brought into court.

WARD moved to bring ſo much money into court, to have it ſtruck out of the declaration. Now the courſe is, upon bringing money into court, to pay coſts ſo far, if the plaintiff will take it out (*a*); but if it be ſuch an action in which the defendant may plead tender in bar of coſts, and that the plaintiff, to ouſt him of that benefit, would reply a ſpecial *capias teſt.* of a Term antecedent to the principal; all this may be opened and ſettled on motion. PER CURIAM.

(*a*) See Anonymous, ante, 614.

* [634]

Caſe 1934. Clifton *againſt* Wells.

Words. "Thou art a "pockywhore," actionable. S. C. 1. Ld. Ray. 710. 1. Roll Ab. 43 1. Sid 50. Cro. Jac. 430. Cro El z. 289. 648 878. Latch, 2. 3. Lev. 205. Carth 55. Palm. 64. 1. Com. Dig. "Action for "Defamation" (D.29) (F.21).

ACTION FOR THESE WORDS, "Thou art a pocky whore, and "carrieſt the pox along with you." And to maintain it theſe caſes were urged, 1. *Sid.* 224. 2. *Sid.* 5. 2. *Cro.* 430. 1. *Ro. Ab.* 67. *per totam pag. Dalton*, 150.

HOLT, *Chief Juſtice.* * No difference between theſe words and thoſe others, "He has got the pox by a yellow-haired wench "in *Moorfields*;" and ſurely to ſay that a woman is "a pocky "whore" is that ſhe is pocky, *quatenus* ſhe is a whore; and to ſay that ſhe carries the pox along with her makes it ſtronger; and actions for words are to be encouraged, for it is a great means to preſerve the peace; and any one will underſtand theſe words to be meant of the *French* pox.

Judgment for the plaintiff.

Jones

Jones *againſt* Sweetapple.

Caſe 1035.

ERROR of a judgment in debt upon a bond in the common pleas.

The error aſſigned was, that it was a bond for appearance taken by the plaintiff *colore officii*; and it was no where ſaid, that the plaintiff was a ſheriff, but only that he took the bond "*per nomen* "*vicecom.*"

Error cannot be aſſigned of a bond taken for appearance, that it was not ſaid to be *per nomen vicecom.* for he might have pleaded the ſtatute.
2. Jones, 138.
2. Mod. 304.

HOLT, *Chief Juſtice.* Then you ſhould have pleaded the ſtatute (*a*), and that matter; and now you are too late.

And judgment was affirmed (*b*).

(*a*) 23. *Hen* 6. c. 10. But it is at length ſettled, that this is a public ſtatute, and therefore it need not now be pleaded, Samuel *v.* Evans, 2. Term Rep 569.

(*b*) See Lavender *v.* Oakes, 2. Stra. 893. and Rogers *v.* Reeves, 1. Term Rep. 418. to 422.

The King *againſt* Croſſe.

Caſe 1036.

AN INDICTMENT was for *a miſdemeanor* for buying ſtolen goods, knowing them to be ſtolen; and a verdict for the king.

A fact made felony by ſtatute not indictable as a miſdemeanor.
S. C. 1. Ld. Ray. 711.
S.C. Trem. 236.

IT WAS MOVED *in arreſt of judgment*, that the offence was felony by a late ſtatute made in the time of the king and queen (*a*), and therefore it was not puniſhable as a miſdemeanor.

And PER CURIAM, Before that ſtatute, buying of ſtolen goods, knowing them to be ſtolen, was only evidence of the party's being acceſſary before; but by this ſtatute ſuch buying is made felony (*a*).

And judgment was arreſted.

(*a*) 3. *Will & Mary. c.* 9. BUT NOTE, This ſtatute provides only to make ſuch as are acceſſaries after guilty of felony. And ſuppoſe one ſets another to be robbed, ſo that he is acceſſary before, yet he is not to be made a felon till conviction of the principal; and if the principal be admitted to his clergy, he ſhall be diſcharged, that is, ſuch acceſſary ſhall. BUT NOTE, This is now remedied by an act of parliament of this queen's. See 1. *Anne*, c.29. ſ. 2. and 5. *Anne*, c. 31. ſ. 6. NOTE *to former edition.* See 1. Hawk. P.C. ch.47. p. 409. Rex *v.* Pollard, 8. Mod. 264. Rex *v.* Wilkes, Caſes C. L. 98. Rex *v.* Baxter, 5 Term Rep. 83. 4. Hawk. P. C. ch. 29. ſ. 44. Foſter's Cro. Law, 374.

Anonymous.

Caſe 1037.

PER CURIAM. It was agreed that the tipſtaffs are the marſhal's officers, and he ought to have the putting of them in; and the cuſtody of the tipſtaff is the cuſtody of the * marſhal. And it is abſolutely neceſſary to charge the marſhal in debt for eſcape, that he have notice of the party's being charged in execution.

Tipſtaffs are marſhal's officers.
*[635]
Ante, 583.

Caſe 1038.

Anonymous.

Verdict on a void award; judgment arreſted.

TO AN ACTION OF DEBT upon an award, the defendant ſet forth a void award, and pleaded performance. The plaintiff joined iſſue upon the performance, and a verdict was given for the plaintiff; and moved this in arreſt of judgment; and judgment thereupon arreſted.

Caſe 1039.

Roſwell *againſt* Prior.

If tenant for years erect a nuſance, for which damages are recovered, and the nuſance is continued in the lands of his leſſee, an action for the continuance of it may be againſt either.
S. C. ante, 215
S. C. 6. Mod. 116.
S. C. 2. Salk. 459.
S. C. Comb. 481.
S.C. Carth. 454.
S. C. Holt, 500.
S. C. 1. Ld. Ray. 392. 713.
S. C. Lilly's Ent. 81. 516.
1. Vent. 237.
2. Lev. 194.
1. Mod. 55.

AN ACTION ON THE CASE for the continuance of a nuſance by a leſſee for years againſt the defendant, who had been alſo a leſſee for years of the place where the nuſance ſtood.

Upon a ſpecial verdict THE CASE was, the defendant being poſſeſſed for years of a piece of ground adjoining to an ancient meſſuage, with antient lights (*a*), whereof the plaintiff was poſſeſſed for years, erected a houſe thereupon, whereby the plaintiff's ſaid lights were ſtopped, for which the plaintiff brought a former action, and recovered damages; after which the defendant *granted* over the ground with the nuſance to another; and after the plaintiff brought this action againſt the defendant for the continuance of that nuſance.

And, Whether it lay? was the queſtion, which was often argued: FIRST, By NORTHEY *for the plaintiff* and BRUTHERICK *for the defendant*; SECONDLY, By DARNEL, *Serjeant, for the plaintiff*, and SIR B. SHOWERS *for the defendant*; and, LASTLY, By WILLIAMS *for the plaintiff*, and WELLS *for the defendant*.

And *for the plaintiff* IT WAS URGED, FIRST, There can be no remedy by aſſize or *quod permittat* againſt the defendant or his aſſignee, becauſe they have but an intereſt for years, and the plaintiff has a wrong done him, and ought to have ſome remedy; and that only can be by an action upon his caſe; and againſt whom ſhall he have it? Surely here it is material who erected the nuſance, for that is the original tort and ground of the action, for *cauſa cauſæ eſt cauſa cauſati*; and by the erection he is become liable to the plaintiff for all the conſequential damages happening to him by means of ſuch tortious erection; and his granting it over to another is ſo far from excuſing him, that it ſeems to aggravate againſt him, for thereby he ſeems to perpetuate the wrong, for he puts it out of his own power to abate it, and likewiſe raiſes himſelf a profit from it by inhancing his rent, and putting it by contract into the * hands of another, who cannot juſtify to abate it without committing waſte. And the erector, by this act of his, would be anſwerable clearly for all conſequential damages, if he had not

* [636]

(*a*) See S. C. 6. Mod. 116.

aſſigned

assigned over; and it were most unreasonable that it should be in his power to do wrong, and a continuing wrong, and have it in his power to choose persons against whom the party wronged shall have remedy, and thereby clear himself. If one is executor of his own wrong, and after take out administration, he shall not thereby so purge the wrong, so as to deprive a creditor of the liberty of charging him as executor of his own wrong; *ergo à fortiori* here. In *Penruddock's Case* (*a*), a *quod permittat* lies against the erector of a nusance without any request made, but not against alienee without request. 2. *Cro.* 373. in point, that an action lies against the lessor for a nusance continued by his lessee, it being erected by him. *Vide* 3. *Cro.* 191. He that is hurt by a nusance, though long after the doing the act that occasions it, shall have his action against him that does such act. 2. *Ro. Abr.* 137. 2. *Leo.* 153. 3. *Leo.* 174. The plaintiff's remedy is of necessity against the defendant or his assignee; it will not lie against the assignee without notice and request, and that must be personal; and that will still be more absurd to favour a wrong-doer, so far as to discharge himself of a remedy against him for a wrong, by putting a farther difficulty upon him to whom he has done the wrong. Besides, it is doubtful whether the action would lie against the under-lessee; and if it does not, surely it will lie against the lessor; for it will not be said, that by the grant over the plaintiff shall be deprived of all remedy. *Vide* 3. *Cro.* 520. that the action would not lie against the assignee of land whereon there is a nusance. 1. *Ro. Rep.* 320. And as to that the diversity was remembered, when the continuance occasions a new nusance, as in case of a pent-house, where every new dropping of the rain is a new nusance, and where the nusance at first dash has done all the mischief it can; in the first case action will lie against the assignee, but not in the other. 2. *Cro.* 373. 555. And the case in 11. *Co.* 51. was strongly urged: Disseisor makes a feoffment over, disseisee re-enters, he shall recover damages for the mean profits against the disseisor, though the feoffee took them; and so is *Hob.* 98.; and that was said to be a stronger case than the principal case now in question.

ROSWELL *against* PRIOR.

3. Co. Walker's Case.

A *quod permittat* lies against the erector of a nusance without request, but as against alienee request is necessary.

1. Vent. 48. 1. Mod. 27.

Nusance continuing nusance, or all at once, different.

Of the other side IT WAS SAID, that this action either lay against assignee alone, or at least it ought to be brought against him * and the assignor jointly; for it being for the continuance only, and that after assignment over; and to make the assignor answer damages in such case were to charge him for a nusance in a place which is not his: and as the assignee has the sole advantage of the continuing, so he ought to be charged with the disadvantages likewise; and for this were quoted 2. *Cro.* 555. *F. N. B.* 124. *H. I.*

* [637]

Before the statute of *Westminster the Second*, c. 24. assize of nusance lay not against erector of a nusance after granting over the freehold; and the only remedy was by *quod permittat*, and that lay only against the alienee. 2. *Inst.* 405. And the alienee alone ought to answer for damages in an action on the case, as he should

Before *West.* 2. 24. assize of nusance lay not against erector of nusance after assignment.

(*a*) 5. Co. 101. a.

ROSWELL *against* PRIOR.

in a *quod permittat*, or at leaſt it ought to be brought againſt them both; as if two coparceners commit a nuſance, and one of them dies, the aſſize or *quod permittat* muſt be brought againſt the ſurviving aunt, and the heir of the other. 2. *Inſt.* 406.

The reaſon of a remedy for a nuſance is becauſe of the maxim, *ſic utere tuo ut alteri non noceas*; and here the thing which occaſions the wrong is not the defendant's; all that the defendant did was to erect, and for that damages have already been recovered againſt him, and ſince he has done no nuſance; for the erection cannot be ſaid a continuance, no more than the continuance to-day can be a continuance to-morrow.

This were to puniſh one for what he cannot redreſs; for he cannot juſtify the abating this nuſance. And this caſe was put by them: If a man does falſly impriſon another, and afterwards the impriſonment is continued at other people's contrivance, the firſt wrongdoer ſhall not anſwer for that in damages, *cujus contrarium verum eſt*, if he were not diſcharged of the firſt impriſonment.

He ought to anſwer damages for the continuance who ought to abate it; and at common law the alienee in caſe of freehold ought to abate, for the *quod permittat* lies againſt him alone; *ergo* he alone ought to anſwer damages upon an action upon the caſe; and the ſame reaſon holds in caſe of leaſe for years. The continuance is the wrong complained of, and the ſole foundation of the action; and the only material queſtion is, By whom it is continued? And ſurely that muſt be the occupier. And damages ought to be recovered againſt him for whoſe benefit it ſtands, and that is the occupier. And as the writ of a demandant is altered by an alienation, ſo may his remedy for damages. If one throw a log over a private way * which *A.* has over his land, and afterwards alien, will an action lie againſt him for the continuance of this log athwart the way in the hand of the alienee? Or if a man build a cottage, without allotting ſo many acres of ground to it, and then grants it over, will action lie for the continuance of it?

* [638]

Erecting and continuance are ſeveral offences, and every day's continuance of the nuſance is a new nuſance; for it is the poſſeſſion and uſage of this nuſance, to the damage of another, is the cauſe of the action, and that is done by the aſſignee. And if the defendant be anſwerable for this nuſance, by the ſame reaſon his heir would, if this were a leaſe out of the inheritance; for he might abate it as well as the defendant, and he would be advantaged by it, by increaſe of the rent.

There is a diverſity between an act that is in itſelf a direct wrong to another, and an act in itſelf lawful, but conſequentially injurious to another. The caſe of diſſeiſin before put is of the firſt ſort, and therefore the diſſeiſor, by making a feoffment over, is not quit of anſwering the mean profits; for otherwiſe the diſſeiſee would be without remedy, for he has none againſt the feoffee, who is in by title,

title, and has done no wrong to him. But the doing the thing on one's own ſoil is primarily and directly no wrong to another, but may be ſo conſequentially by the effects of it; and for this *vide* 1. *Roll. Rep.* 393. One ſet up poles in his own ground in order to build a houſe, which when erected would be a nuſance to another, he cannot abate them to prevent the nuſance; and if a treſpaſſer builds a nuſance upon my ſoil, and I never uſe it, *quære* whether the other has any other remedy than by abating it. And here the plaintiff has his remedy againſt the aſſignee for the continuance, ſo there is no neceſſity to give him one againſt the aſſignor; and the neceſſity is the reaſon of the caſe of the diſſeiſin ſo much inſiſted on.

ROSWELL *againſt* PRIOR.

It is true, one ſhall not transfer his wrong over to another, ſo as to diſcharge himſelf; and that is alſo a reaſon of the caſe of diſſeiſin before put. But here the erecting the houſe is not in itſelf a tortious act, but becomes ſo only *ab effectu*. And here is a recovery againſt the defendant already for the tort ariſing from the erecting, and thereby the erecting is altogether become lawful; for the recovery is a recompence for the wrong, and gives the wrong-doer a right to that which before was wrongful: as if *A.* takes away the horſe of *B.* for which he recovers * damages, the property of the horſe is thereby veſted in *A.* And if in this caſe the aſſignee had aſſigned over, would an action lie againſt him for the continuance after? If it would not, there is no reaſon it ſhould in this caſe, for the original tort is here purged by the recovery.

* [639]

PER CURIAM. A *quod permittat* muſt be brought againſt the alienee, becauſe in its nature it muſt be brought againſt him that is tenant to the freehold. An aſſize of nuſance muſt be againſt the alienor and alienee; but if the alienee dies, the party muſt have a writ of entry in the *per*, and not an aſſize. And ſurely this action is well brought againſt the erector, for before his aſſignment over he was liable for all conſequential damages; and it ſhall not be in his power to diſcharge himſelf by granting it over; and more eſpecially here, where he grants over, reſerving rent, whereby he agrees with the grantee that the nuſance ſhould continue, and has a recompence, *viz.* the rent, for the ſame; for ſurely when one erects a nuſance, and grants it over in that manner, he is a continuor with a witneſs. And ſuppoſe in this caſe the leſſor or aſſignor had been ſeiſed in fee, and had erected this nuſance, and then infeoffed another over, he had conveyed this as a nuſance, and *cauſa cauſæ eſt cauſa cauſati*. And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redreſs it, he ought to anſwer for it. And whereas it is objected, that the tort of erecting is purged by the recovery for the erecting, that is not ſo, for then the erector might lawfully continue the nuſance; but if the nuſance continue after recovery for the erection, ſuch continuance will be ſuch a nuſance as a new action will lie for: and the putting it out of one's power to abate a nuſance is as great a tort as not to abate it when it is in your power to do it. And it is a fundamental principle in law and

A *quod permittat* can only be brought againſt the alienee, as being tenant of the freehold.

Action may be brought againſt the erector, he thereby being liable for all conſequential damages, which he cannot purge by aſſignment over.

Action will lie for continuance of a nuſance.

Vide 2. Cro. 232.

He who does the first wrong shall answer for all consequential damages.

reason, that he that does the first wrong shall answer for all consequential damages; and here the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated. And the case of the disseisor and disseisee is full in the point; for what makes the disseisor liable for damages when the lands were in the hands of his feoffee but the original tort? And in case of disseisin, trespass does not lie for the profits till re-entry; and by the re-entry, though it be upon the fourth or fifth feoffee, the disseisin is purged, and whoever continues in after is a new trespasser; and for continuing in after such entry, * [640] damages shall be recovered against the * feoffee; for the disseisin by his re-entry was purged, and the title by which the feoffee was in is defeated, and the feoffee continuing in after is a trespasser, or disseisor, as the disseisee pleases. And the distinction, that the building is not merely a nusance, is very metaphysical. It is true, if you abstract the building from the hurt that it occasions to the neighbour, it is no nusance; but surely the building a house, which is a nusance, is a *malum in se*, for one must use his own so as not to hurt another; and these lights being antient, the plaintiff has as much right to them as the defendant has to the land; and his use of the land is restrained by the interest the plaintiff has in his lights.

NOTE: It was farther said by THE COURT, that if one takes another prisoner by wrong, and then turns him over to another officer, who detains him, the first taker shall answer for all the consequential damages. But if this action here were brought by an alienee of the land, to which the nusance was, against the erector, and erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee. But here they agreed to give judgment for the plaintiff.

NOTE: HOLT, *Chief Justice*, said, in the debate of this case, that he was not satisfied with the case of *Rippon v. Bowls* (*a*).

Whether it be waste in alienee to abate a nusance.

FIRST, That it would be waste in the lessee to abate the nusance.

Though action lies against either, shall be but one satisfaction.

SECONDLY, In case it were, that therefore an action would not lie against him for the continuance of it; for it was the lessee's fault to contract for an interest in land on which there is a nusance. But the action lying against the lessee is no reason why it should not lie against the lessor, for the party shall have but one satisfaction; for, the plaintiff having his election against which of them to bring it, by commencing it against one has determined his election: as if one may bring trover against two jointly or severally, and he brings it against one, and has damages once ascertained, he is for ever barred against the other; and so it is in battery.

(*a*) Cro. Jac. 373.

Finch

Finch *againſt* Harris.

Caſe 1040.

PROHIBITION was moved for to ſtay a ſuit in the ſpiritual court, againſt a clerk in orders, for preaching without a licence, upon ſuggeſtion, that there is a chapel donative within ſuch a pariſh, four miles diſtant from the * mother-church, and that it is conſecrated; and that this ſuit below is for preaching there; ſo the ordinary has nothing to do with it; and the deſign of this libel is to bring in queſtion whether this be a donative or a chapel of eaſe.

Though donative be exempt from the ordinary's juriſdiction, the clerk of it is not, who may be puniſhed by eccleſiaſtic cenſures, but not to deprivation.

But PER CURIAM, None can preach without licence of the ordinary (*a*), whoſe cure it is to prevent hereſies and ſchiſms in his dioceſe; and there is a canon againſt preaching without licence, and that binds all the clergy. And a clerk ordained cannot preach even in the dioceſe whereof he is, and by whoſe dioceſan he is ordained, without licence; though one would think the very ordination would amount to a licence to preach within that dioceſe. And though it be true, that the ordinary cannot puniſh him by deprivation of this benefice (*b*), it being a donative, yet he may cenſure him otherwiſe; for otherwiſe the inconvenience would be intolerable, that it ſhould be in the power of a man, by putting in a clerk into ſuch donative, to exempt him from the cenſures of the ordinary and ſubordination to the eccleſiaſtical law (*c*).

Ante, 420. 433.

None can preach without licence.

And *per* HOLT, *Chief Juſtice*, It is againſt the law eccleſiaſtical to preach in a place not conſecrated; and it would be to ſet up a conventicle. Indeed one may pray in his own houſe for his family, but he cannot preach there; and this clerk, without queſtion, is viſitable by the ordinary, though he has no juriſdiction over the thing, ſo as to deprive, as in caſe of a rectory.

And here they at laſt moved for a prohibition *quoad* the reading prayers;

But it was denied.

(*a*) But ſee Allane *v.* Exton, 1. Mod. 90. Powell *v.* Milbourne, 3 Wilſ. 361. Campbell *v.* Aldrich, 2. Wilſ. 79. See alſo 1. Term Rep. 403.

(*b*) Ladd *v.* Widdowes, 2. Salk. 541.

(*c*) See 2. Burr. E. L. "Donative," page 195. Co. Litt. 344. Coleſatt *v.* Newcomb, 2. Ld. Ray. 1205. Caſtle *v.* Richardſon, Stra. 715.

Anonymous.

Caſe 1041.

PER CURIAM. One committed to marſhal by the Court, may be brought up by rule of Court; but one committed by a Judge in his chamber cannot be brought up without a *habeas corpus*, to which a return may be made.

One committed by Judge in his chambers muſt be brought up by *habeas corpus*.

Stretch.

Caſe 1042. **Stretchpoint *againſt* Savage.**

A declaration for uſing a trade from 23. *Feb.* to 23. *Jan.* following, viz. *per duodecim menſes integras*, is bad, but may be cured by verdict.

DEBT upon the ſtatute of 5. *Eliz. c.* 4. ſ. 31. for uſing the trade of making "*chartas pictas*," ANGLICE *playing cards*, from the twenty-third of *February* until the twenty-third of *January* following, *viz. per duodecim menſes integras*, not having ſerved his time for ſeven years.

Vide 1. Vent. 214.

After verdict IT WAS MOVED *in arreſt of judgment*, that the computation here is by *calendar months*, whereas by the ſtatute it muſt be by *lunar months*; and for this was quoted the caſe of *King v. Stowbridge* (*a*). And if this ſhould be conſtrued, that if he uſed it for the time mentioned here, he muſt have uſed it for eleven *luuar* months of neceſſity, then it will be incertain when they will begin the computation; and the defendant may be again charged for part of the time for which this recovery now is, and cannot plead this recovery in bar; and the right way had been to ſay, that from ſuch a day *per undecim menſes prox. ſequen.* he uſed it.

* [642]

An action for making *chartas pictas*, ANGLICE *playing cards*, good.

THE SECOND EXCEPTION was, that "*chartæ pictæ*" were *painted cards*, and not *playing cards*, for the *Latin* for playing cards is "*chartæ luſoriæ*."

But PER CURIAM, The *Romans* had not playing cards, and *chartæ luſoriæ* may as well be a kite as any thing elſe;—but the other would be fatal, but is helped by the verdict's finding him guilty of two months *lunar* next after the twenty-third of *February*. And if a man uſe a trade fourteen days in one month, and then ceaſes, and uſes again fourteen days in the next month, he is not puniſhable by the ſtatute.

(*a*) Michaelmas Term, 6 *Will* 3.

Caſe 1043. **Colt *againſt* Swift.**

Conviction of manſlaughter, is a good bar to an appeal if the indictment was good, and the plea is well pleaded.

IN an appeal of murder by *Colt* againſt *Swift* for the death of his brother, a conviction of manſlaughter, and clergy allowed, was pleaded in bar, and allowed to be good.

BUT IT WAS ALSO AGREED, that if the indictment, on which the conviction was, were vicious, or if this plea were ill pleaded, the defendant muſt plead to iſſue.

Deſcription of the wound in an indictment of murder is only to ſhew it was mortal.

And therefore IT WAS EXCEPTED to the indictment, that the latitude of the wound was not ſet forth. *Vide* 4. *Co.* 40. & 42.

By

But *non allocatur*; for the depth of the wound and the place where it was were aſcertained; and the reaſon why ſuch curiouſneſs is requiſite is, that it may appear to be the ſame in identity, and that it was mortal; and both theſe ends are anſwered by the deſcription of the wound, as it is in the indictment. COLT *againſt* SWIFT.

ANOTHER EXCEPTION was, that the indictment ſet forth, that two others were preſent and abetting, but did not ſay in what county they were. A principal in murder cannot take advantage of a deſect of *venue* as to aiders and abettors.

Sed non allocatur; for however that might be as to the abettors, yet it could not be an exception for him, who was charged as principal, for it was laid where he was.

And here, *per* HOLT, *Chief Juſtice*,

FIRST, The benefit of the clergy, and *burning in the hand*, is no judgment. Benefit of clergy.

SECONDLY, If a man be convicted of manſlaughter, and no judgment of death given, *Auterfoits convict* will not be a good bar of an appeal, but conviction and benefit of clergy is. Judgment muſt be given to warrant *auterfoits convict*.

THIRDLY, If one be convicted of manſlaughter upon an appeal, the king may pardon the burning in the hand, which ſhews it is * no judgment, for then could not the king pardon it: and the ſtatute of *Henry the Seventh* has taken away the judgment of delivering over to the clergy, but orders a mark to be put on the party. The burning in the hand on a conviction of manſlaughter may be pardoned.

Croſſe *againſt* Smith.

Caſe 1044.

ERROR of a judgment in the court of *Ely*, in an action for words. The error aſſigned was, that after the plaint levied, and before iſſue tried, a *certiorari* iſſued out of the court of common pleas to remove the proceedings into that court, which writ was duly ſerved upon the judge, before the jury ſworn, and allowed by him; that notwithſtanding he proceeded to try the cauſe, and ſo gave judgment, which was void, as being *coram non judice*. A *certiorari* lies from the court of common pleas to remove an action from the court in the iſle of *Ely*; and if the writ be duly ſerved on the judge below, and he afterwards proceeds to try the cauſe, the proceedings are erroneous; for the charter, giving this court the conuſance of pleas, does not ouſt the common-law courts of their ordinary juriſdiction. Poſt. in this Term, Taylor *v.* Reignolds. S. C. 1. Salk. 148. S. C. 3. Salk. 79. S. C. 7. Mod. 138. S. C. 2. Ld. Ray. 836.

To this the defendant pleaded the charters of creation of the franchiſe of conuſance of pleas to the predeceſſors of the biſhop of *Ely*, and an allowance thereof in the courts of *Weſtminſter* Hall:

And on demurrer the caſe was argued ſeveral times at the Bar.

And now HOLT, *Chief Juſtice*, delivered the judgment of the Court. Surely if the *certiorari* be well penned, it is a *ſuperſedeas* of all proceedings below; and the Counſel cannot be in earneſt, when they pretend to make the franchiſe of *Ely* in equal degree with that of a county palatine. And admit the charter had been to hold plea of all matters ariſing within that precinct; can any man think that by this all the king's ſubjects ſhould loſe the benefit of the

king's

3. Vent. 156.

ſance of pleas: What is that? That one living
diction ſhould implead another in the biſhop's c
action ariſing within that juriſdiction; and wh
if the action ſhould be commenced above? Not
he cannot plead * it to the juriſdiction of the ſi
the courſe is for the lord of the franchiſe, by hir
attorney, to come into the ſuperior court, and p
of conuſance; or if it be very antient, to ſhew
in that court, and pray conuſance. And upo
claim, the court above appoints him a day to hold
directs the parties to go down on that day; an
done below, the record remaineth here above; a
conſtant ſuperintendancy over the cauſe. So th
done below, as if the defendant live without the
nothing within the franchiſe by which he may
if the judge does not do right, the plaintiff may
this matter to the Court, and thereupon a re-
upon the record here, and the Court ſhall pro
here; ſo that though conuſance be allowed acco
yet the matter ſhall be brought back hither, if
below; and all this was for the benefit of the lor
and even this was hard enough upon the ſubject.
great reaſon for this courſe in former days, wh
abet and maintain parties, and theſe great franch
tained by abbots and churchmen, who then had
lands of the kingdom in their poſſeſſion; and the
macy more from length of time than from any
was for them. And ſo is the ſtatute of 27. *H*
cerning reſumption of liberties, that all theſe juriſ
mental to the king and his prerogative; and for
power of pardoning in county palatines, and m
is taken away. And there have been always *cer*

matter. And if ſuch inhabitant, in that caſe, be impleaded in any other court, he ſhall plead this franchiſe to the juriſdiction; and if he were ſued below, he might have a *certiorari* and remove it up; for the privilege of being ſued no where elſe being for his advantage, he may wave it: ſo there is no court can ſtand againſt a *certiorari*. In *London* they have a way of proceeding by *foreign attachment*; yet it is every day's practice to remove * the cauſe up hither by *certiorari*, and thereby all the proceedings below upon the attachment are diſſolved. A third ſort of franchiſe is *tenere placita*, that is power to hold plea of matters within ſuch a precinct, but does not exclude any other juriſdiction, nor intitle the lord to claim conuſance. 9. *Hen.* 6. *pl.* 59. Caſes are removable out of inferior baſe courts, by *recordare* or *pone*, as the caſe ſhall require; but to remove out of a court of record, it muſt be by *certiorari*. And to ſay ſuch a writ is not found in the Regiſter, *ergo* it does not lie, is no argument, for half the writs uſed in WESTMINSTER-HALL are not in *the Regiſter*. The ſtatute of 43. *Eliz.* means *certiorari's* by the words "other writs," and it is remarkable, that the thing complained of there is, not that the writs were uſed, when in truth they did not lie, but that an abuſe was made of them, *viz.* that they were brought after trial; and therefore it provides that no *certiorari* or *habeas corpus* ſhall be ſworn or allowed, unleſs it be delivered before the jury ſworn. And again, the ſtatute of 21. *Jac.* 1. *c.* 23. takes notice of *certiorari*, and only complains of the oppreſſive manner of uſing them, *viz.* after party had proceeded a conſiderable way below, and likewiſe removing cauſes of ſmall value; and therefore the courts below are allowed to detain cauſes under five pounds; and likewiſe where the *certiorari* or *habeas corpus* is not delivered before iſſue joined, ſo that it be not joined within ſix weeks after, &c. both which ſtatutes ſhew this writ was lawful, but abuſed, and the abuſes are only cured; and if the writ were not legal, the parliament would have condemned it, as well as the abuſe of it. And the king's courts are for his ſubjects and people, as well as for himſelf; and as when it is granted to a corporation to hold a ſeſſion of the peace within their borough, before ſuch and ſuch juſtices, that are freemen of the town, though ſuch a grant is a franchiſe to them, and it is as much their right to hold ſeſſions and take conuſance of matters proper for their juriſdiction, as it is the *Biſhop of Ely's* right in this caſe; yet by daily practice *certiorari's* go to them to remove indictments from before them to this court; ſo by the ſame reaſon it will lie here; and it is more juſt and honourable for the ſubject to receive juſtice in the king's immediate courts, and from Judges appointed by himſelf, than from Judges named by his fellow ſubject; and there is as much difference between the king's * courts and thoſe that are held by franchiſes, as there is between the people he governs by himſelf, and thoſe he governs by his vice-roys in his plantations. And he quoted a caſe in 2. *Roll. Abr.* 493. *Jonſon v. Ellis*: An action was brought in the court of *Maidſtone*, and an *habeas corpus* brought and ſerved in due

CROSSE *againſt* SMITH.

* [645]

Franchiſe to hold plea of matter within ſuch a precinct, does not exclude any other juriſdiction.

Caſes are removed out of baſe courts by *recordare* or *pone*, but out of courts of record by *certiorari*.

* [646]

Crosse *against* Smith.

due time, and notwithſtanding judgment given below; and this judgment was for this error reverſed. So here if the *certiorari* be good in the form and frame of it, that is, if it deſcribe the record right, without doubt the judgment is erroneous.

It is better to bring *habeas corpus* than *certiorari*.

And Holt, *Chief Juſtice*, ſaid, he wondered the people did not bring a *habeas corpus* and not a *certiorari*; for the defendant may well ſay, I will not be ſued in this inferior court, but will be ſued above, and there I will put you in ſuch bail as the Court above will reach, though your proceſs cannot come at them, and that I cannot give you ſuch bail as you can reach: and ſo he may well remove the cauſe by *habeas corpus*. And in ſuch caſe, if he do not put in ſuch bail above as the action would require below, a *procedendo* ſhould be granted; for if by the courſe below there ought to be ſpecial bail, though common bail would do if it had commenced above originally, yet ſpecial bail muſt be given above, or a *procedendo* ſhall go. And if one action require ſpecial bail, and another not, and that do not appear to be done fraudulently to hold to ſpecial bail, there we will hold it to ſpecial bail, or grant a *procedendo*; but if fraud appear, we will retain it. And though the principal caſe be between two perſons dwelling within the *Iſle* of *Ely*, yet that makes no difference. And he ſaid he had known inferior courts held to harder play than this, for he had known in the common pleas, that in eſcape out of execution upon a judgment in an inferior court, the officer was let in to alledge that the original cauſe of action was not within their juriſdiction, though it were laid to have been within it, admitted by the party ſo to be: But I think that hard, becauſe it is a court having juriſdiction; and ſince they have ſhewed the matter within that juriſdiction, and that has been admitted on record. I hold the party himſelf would be after concluded to ſay that it was not within, and by conſequence the officer is ſo too. And it has been held that falſe impriſonment would lie againſt an officer for the arreſt, if the cauſe had not ariſen within their juriſdiction, though it had been alledged by the plaintiff to have ariſen within it, and ſo confeſſed by the defendant, but that was hard. But the beſt way is to * make right uſe of their juriſdiction, and not to pretend to hinder the ſubject of his right of uſing the king's courts: And property is much larger now than formerly; for then there were many villains, but now we are all freemen.

If by the courſe below ſpecial bail be required, ſpecial bail muſt be above, elſe *procedendo* ſhall go.

* [647]

So per Curiam, It is apparent error.

But then an exception was taken to the writ of *certiorari*.

Caſe 1045.

Thomſon *againſt* Southwell.

The Court will take notice what day of the month Term begins.

Declaration was generally of *Eaſter Term*; and cauſe of action laid in ſuch a day in *April*, which day in fact was within the Term.

First,

FIRST, It was agreed that the Court would judicially take notice of the firſt day of that Term, *viz.* what day of the month it was, and conſequently that the cauſe of action accrued after it (*a*).

Declaration of ſuch a Term refers to the firſt day, if there be no ſpecial memorandum.

1. Sid. 373. 432. 2. Lev. 176. Carth. 114. T. Jones, 87. Cowp. 456.

SECONDLY, That a declaration generally of ſuch a Term, without any *ſpecial memorandum*, refers to the firſt day of Term; otherwiſe if there were *a ſpecial memorandum* of the time of filing the bill, or of giving bail; ſo if it be made out in fact to have been at a day after the day of cauſe of action mentioned, it may be ſet right (*b*).

But upon examination, it appeared the declaration was accepted by conſent;

Which HOLT, *Chief Juſtice*, ſaid, was a filing of common bail of courſe, but there was no writ or proceſs returnable; and thereupon

HOLT, *Chief Juſtice*, declared, if there were a proceſs returnable at a day certain, and it had appeared when bail had been put in, that would be a ground for amendment; but it being only found that common bail was filed, that muſt refer to the firſt day of Term.

And the judgment was arreſted (*c*). *Vide* 2. *Lev.* 12, 13. 176. 3. *Keb.* 112. 124. 693. 1. *Vent.* 135. *Hob.* 70.

(*a*) 1. Sid. 304. 308. Cro Jac. 548. Cro. Eliz. 210. Cro Car. 53.

(*b*) 2. Stra. 1271. 1. Wilſ. 271. 1. Black. Rep. 312. 3. Burr. Rep. 1241. Tidd's Pract. 191. B. R. H. 241.

(*c*) The party may now file a new bill, and amend by that, Ruſſell *v.* Martin, 1. Stra. 583. and the Court will not permit the time of filing it to be enquired into, Wilder *v.* Handy, 2. Stra. 1151. Marſhall *v.* Riggs, 2. Stra. 1162.

The King *againſt* Cranmer. Caſe 1046.

AN INDICTMENT was for perjury; the defendant entered into a recognizance to try it, and was deſirous to carry it down to try, but the proſecutor entered a *non proſ.*

Non proſ. entered by proſecutor, ſet aſide.

S. C. 1. Ld. Ray. 721.

PER CURIAM. It was an ancient but illegal practice, that if an indictment had lay ſtill for a long time, to enter a *non proſ.* upon it. But that ought not to be without leave of THE ATTORNEY GENERAL, not even at the requeſt of the proſecutor; for it would be of intolerable miſchief, that it ſhould be at the diſcretion of the proſecutor to make an end of the king's ſuit, and alſo to get a bill for an infamous * crime found of record againſt one, and by ſuch entry of *non proſ.* deprive him of the means of clearing himſelf by trial.

* [648]

And for theſe reaſons THE COURT did ſet it aſide; and if the indictment be vitious, an acquittal in it will be no bar to a new one.

Anonymous.

Caſe 1047. Anonymous.

Venue not changed in covenant.

VENUE is never changed in covenant.

Say. Rep. 146. 1. Term Rep. 781. Tidd's Pract. 358.

Caſe 1048. Anonymous.

Riot may be by aſſerting a right with force.

PER CURIAM. If one go to aſſert his right with force and violence, he may be guilty of a riot.

Caſe 1049. Anonymous.

Common.

A. has right of common in ſuch a cloſe, which belongs to *B.* who, after the corn taken away ſows peaſe in it; he cannot by ſuch a trick deprive *A.* of the benefit of his common.

Caſe 1050. Courtney *againſt* Hornigold.

On claiming *oyer* of an award, if it contain more matter than the plaintiff has ſet out, he cannot recover.

Ante, 533.

DEBT UPON A BOND for performance of an award; "*nul* "*award*" pleaded; the replication ſets forth an award of ſuch and ſuch things of one ſide, and ſuch things to be performed of the other ſide, all well awarded; aſſigns breach; and brings the award into court; the defendant prays *oyer* thereof, and has it; whereby it appeared that it did contain more matter than the plaintiff did ſhew in his replication; and demurs for the variance.

AND IT WAS URGED, that if iſſue had been taken upon the replication, and the award, whereof *oyer* was given, had been produced in evidence, the plaintiff muſt have been nonſuited, for they were quite different awards. And the award is intire, and ought to be altogether ſet out, for there may be that in the award, which if ſet out might make it all void, or at leaſt ſhew that the plaintiff had no cauſe of action: for ſuppoſe here they had concluded by declaring that they had made no award, or had awarded that the plaintiff ſhould deliver to the defendant twenty pounds and a horſe, and that thereupon the defendant ſhould deliver a certain deed to the plaintiff; can it be ſaid, if the plaintiff had brought debt upon a bond for the performance of that award, and upon "*nul award*" pleaded ſhould reply, and ſet forth an award that the plaintiff was to deliver the defendant a horſe, whereupon the defendant ſhould give him up the deed, that upon iſſue thereupon the award made would maintain the iſſue? Beſides, the ſubmiſſion is with an "*ita* "*quod de præmiſſis*," and the award ſet out in the replication is not ſo. It * was agreed, that perhaps in debt upon the award this way would do; but this being a collateral thing, *viz.* a bond with a penalty, it will not do.

* [649]

TO WHICH *it was anſwered*, That true it is, if the defendant had come to excuſe himſelf of the forfeiture of his bond, he ought to ſet out the whole award; but when one is only to ſhew cauſe of

of action, it will ſuffice to ſhew enough that a cauſe of action may appear to the Court; *vide Woodman* and *Mantle's* Caſe in *Plowd.* and *Hammond* and ——— Caſe in *Brownl.* If a man be bound to *B.* to pay him ſuch a ſum, provided he makes a feoffment upon condition to *C.* in an action brought upon this bond, the defendant ſhall not crave *oyer* of the deed of feoffment, and alledge that it is not according to the condition of the bond. COURTNEY *againſt* HORNIGOLD.

HOLT, *Chief Juſtice.* The award muſt be reciprocal, or elſe it is not good; and you have omitted part of what is to be done of one ſide, and therefore a part of the award to be done of your ſide, which was traverſable by the defendant; and if it would be againſt you on verdict, it will be ſo too on demurrer upon *oyer.* And though your declaration upon the bond, and the breach alledged be well, yet if that which you ſhew upon *oyer* does not maintain it, you are gone, where it is neceſſary to ſet out a collateral matter to make the declaration good. And he adviſed them to diſcontinue, and pay coſts, and ſo they did.

Stamford *againſt* Sims.

Caſe 1051.

IN replevin, the defendant avowed the taking *in quodam meſſuagio vocat.* The *D.* in ſuch a pariſh. Pleading in replevin.

NOTE, The replevin was for goods taken *in quodam meſſuagio vocat. B.* and the avowry, that *prædictum meſſuag. in quo* the taking was, was called *D. abſque hoc*, that the taking was in *B.*; and upon demurrer, 1. Leon. 44. Cro. Jac. 372. Cro. Eliz. 504. 3. Wilſ. 295.

Judgment was given for the plaintiff PER CURIAM; for the way had been to ſay, that the *locus in quo* the taking was, was called *D.* ABSQUE HOC, that it was in the ſaid meſſuage *vocat. B.* and *pro retorno habendo* to make title to the diſtreſs. *Vide* 2. *Lev.* 92. 1. *Vent.* 127. *ant.* 67.

* [650]

* Smith *againſt* Oxbring.

Caſe 1052.

DEBT upon a recognizance bail. HOLT, *Chief Juſtice.* This is much practiſed of late to ouſt the bail of the benefit of rendering the principal, as he may do on a *ſcire facias*; and ſince there is reaſon the bail ſhould have equal indulgence in both caſes, let THE RULE be, that the bail have *eight days* in full Term after return of proceſs againſt the principal to render him. So if for the purpoſe proceſs be returned only within *four days* of the end of the Term, the bail ſhall have *four days* in the next Term to render, and upon their bringing in the principal in the mean time they ſhall be diſcharged; and till that time be paſt, the Court will grant an imparlance. Bail ſhall have *eight days* in full Term, after return of proceſs againſt the principal, to render. 1. Ld. Ray. 83. 1. Salk. 101. 1. Ld. Ray. 721. 6. Mod. 132. Lodd's Pract. 146. 2. Stra. 915. Impey's Pract. Rep. 363.

4. edit. 409. Barnes, 62. 1. Cromp Pract. 70. 5. Term

Caſe 1053.

Jackſon *againſt* Bridge.

Covenant by executor againſt a perſon on a covenant to ſerve teſtator or his aſſigns, averring that he uſed the ſame trade.

DEFENDANT did covenant to ſerve the plaintiff's teſtator and his aſſigns for eight years.

The queſtion was, Whether the plaintiff as executor was an aſſignee in law? for by the agreement it is not fixed to the perſon of the teſtator; for if it were, the executor ſhould have it, and it would be aſſets in his hands, *vide Plowd.* 287. *b.* 288. *a.*

2. H. Bl. Rep. 133.

And it was ſaid, that if the executor did ſet up ſuch a trade as the ſervant was to be employed in by the covenant, it ought not to determine by death of the covenantee. *Secus* it were hard to transfer the ſervant to another ſervice, and ſo it was ſaid it would be in caſe of an apprentice (*a*).

And here it being averred that the plaintiff uſed the ſame trade in which the defendant had covenanted to ſerve, he had judgment.

(*a*) See as to apprentices, Wadſworth *v.* Executors of Grey, 1. Keb. 820. 1. Sid. 216. Rex *v.* Channel. 3. Keb. 519. Rex *v.* Pet, 1. Shower, 405. Salk 66. Caiſtor *v.* Eccles, 1. Ld. Ray. 683. Salk. 68. 1. Wilſ. 96. Baxter *v.* Binfield, 1. Conſt's P. L. 523. Rex *v.* Eakring, Burr. S. C. 320.

Caſe 1054.

Gibbs *againſt* Walkley.

Double error in fact aſſigned is ill. But if there be error apparent in the record, ſhall be reverſed.

A DOUBLE ERROR in fact was aſſigned. And *per* HOLT, *Chief Juſtice*, The way is to plead *in nullo eſt erratum*, and ſhew the duplicity for cauſe to affirm the judgment, *vide* 1. *Roll. Abr.* 763. But if apparent error appear on the record, notwithſtanding the ill aſſigning of the error in fact by reaſon of the duplicity; yet judgment ought to be reverſed for * ſuch apparent error.

* [651]

But here no ſuch error appearing on the record, the judgment was affirmed, becauſe of the duplicity of the error in fact. PER CURIAM.

Caſe 1055.

Lane *againſt* Green.

A declaration in debt on bond in 1689 good, though the bond was dated in 1699.

DECLARATION, That the defendant the eighth of *September* 1689, *per ſcriptum ſuum obligatorium conceſſit ſe teneri, &c.* to the plaintiff; and, upon *oyer*, the bond bore date the eighth of *September* 1699, and for *the variance* a demurrer.

It was urged, that ſince the plaintiff varied the lien from the date of the bond, he ought to ſhew when it was firſt delivered; and the right way had been to declare upon the bond with the date it bore, and then to ſay *primo deliberat.* at ſuch a time, and at this rate one might declare upon a bond after the action brought.

But

But PER CURIAM, Since it is ſaid that ſuch a day *conceſſit ſe teneri*, it is well, for that could not be without it were then delivered; it is well enough. LANE *againſt* GREEN.

Judgment was given for the plaintiff.

Gree *againſt* Rolle. Caſe 1056.

EJECTMENT againſt two, who entef into the common rule of conſeſſing *leaſe*, *entry* and *ouſter*. At the trial before a Judge of *niſi prius*, one of them refuſes to conſeſs leaſe, entry and ouſter, and the plaintiff enters a *retraxit* againſt him, which the Judge of *niſi prius* records, and goes on to trial againſt the other, and verdict for the plaintiff. In ejectment a *retraxit* was entered as to one at *niſi prius*, and trial againſt the others, and held well.

And IT WAS MOVED *in arreſt of judgment*, FIRST, That a Judge of *niſi prius* cannot record a *retraxit*, for before the *ſtatute of York (a)* he could not record a nonſuit, and a nonſuit againſt one would make an end againſt both; and yet a *retraxit*, as here contended for, would not make an end as to both, but would ſever the pleas of the parties againſt their own conſent. It is true, if they had ſevered in pleading, a *retraxit* againſt one would not diſcharge the ſuit againſt them both, for there the one defendant is not concerned with the other. 1. *Sid.* 76. Covenant againſt two to build a houſe artificially, and one of them lets judgment go againſt him by default; the other pleads that he did build the houſe artificially, and a verdict for him; and held, he that ſuffered judgment by default ſhould be diſcharged too, for now it appears there was not ſuch cauſe * of action againſt both, as the plaintiff declared on. 1. *Sid.* 376. Action againſt two executors, one of them confeſſes a ſmall quantity of aſſets, and the plaintiff replies aſſets *ultra*; *vide* the Book at large, which HOLT, *Chief Juſtice*, denied to be law, and quoted *Long quinto Edw.* 4. 108. *Bro. Judg.* 77. Before 12. *Ed.* 2. c. 4. Judge of *niſi prius* could not record a nonſuit. S. C. Salk. 456. S. C. Comy. Rep. 113. * [652]

And it was further urged, that the entry of a *retraxit* did not diſcharge the defendant, againſt whom it was entered, from being party to the iſſue, till there is judgment given *quod eat inde ſine die*; and that cannot be done by a Judge of *niſi prius*, but muſt be done above after the return of THE POSTEA, and the eſtoppel begins from that judgment; and a *retraxit* muſt be entered in court, and *in propriâ perſonâ*, and cannot be by attorney according to the rule of *Beecher's Caſe (b)*.

SECONDLY, It was ſaid, that after a *retraxit* againſt one, the Judge could not try the cauſe againſt the other, for his commiſſion was to try an action againſt two; the parties themſelves might have ſevered in pleading, but the Judge of *niſi prius* has only power to try the action. This is not like a protection, which the Judge

(*a*) 12. *Edw.* 2. c. 4. (*b*) 1. Danv. Abr. 606.

GREE *againſt* ROLLE

of aſſize may receive and record, and yet may proceed and try the cauſe; for if the protection lies not, or lies and is not well caſt, the trial ſhall ſtand; but if it lies and is well caſt, the trial ſhall go for nothing; but after a *retraxit* well entered againſt one, the Judge of aſſize has no more power to try the cauſe than he has upon a plea *puis darrein continuance*; and there all he can do is to record the plea, and bring it up, and then the other party may reply, take iſſue, or demur, and the matter ſhall be determined above.

Quod HOLT, *Chief Juſtice, conceſſit.*

And if the Judge of *niſi prius* cannot diſcharge the defendant, he ſtill remains party to the iſſue before him; and the Judge's commiſſion being only to try that iſſue to which he is party and privy, he can try no other; and he ſaid, a Judge of *niſi prius* could not plead an excommunication in the plea *puis darrein continuance*, though that be a legal diſability, and the defendant had no other opportunity of pleading it; and that is a much ſtronger caſe than the preſent, and more deſerving of the equity of the ſtatute of *York*, 17. *Edw.* 2. c. 4. and 18. *Edw.* 3 38. and 2. *Roll. Abr.* 630. are expreſs, that a Judge of *niſi prius* cannot take a plea of excommunication; but he may do whatever is neceſſarily incident to the trial, as to take a challenge to the array or juror, witneſs, &c. and it is by ſubſequent acts of parliament that they have power to give judgments in ſome particular caſes, as felony, treaſon, *quare impedit*, &c. * *vide Hard.* 112. *Style*, 104. and the ſtatute of 14. *Hen.* 6. *Weſtminſter the Second*, c. 3. for, as Judges of *niſi prius*, they can do nothing but what tends to the trial of the iſſue, and without a judgment one cannot be ſevered from the iſſue, and then it cannot be tried againſt one without the other.

* [653]

Judge of *niſi prius* records plea *puis darrein continuance.*

TO WHICH *it was ſaid*, that a Judge of *niſi prius* may do whatever tends to the aid or furtherance of the buſineſs. 2. *Inſt.* 425. 17. *Edw.* 3. 22. He may receive a protection. Plea *puis darrein continuance* is recorded every day by them: They may likewiſe receive a challenge, and record a demurrer to it. *Yelv.* 181. And why may he not as well receive and enter a *retraxit*, which is no more than an agreement on record, that he will not proſecute againſt that party; and a *retraxit* is not a confeſſion of the want of cauſe of action, but an agreement not to proceed. And therefore if treſpaſs be brought againſt two, one may enter a *retraxit* againſt one, and proceed againſt the other, for by the *retraxit* the writ does not abate; and yet if he had confeſſed, that he had no cauſe of action againſt one of them, the writ would have abated, and he could not proceed againſt the other; for ſuch confeſſion falſifies his writ, which a *retraxit* does not; and in ejectment againſt two, and a joint plea, and *venire*, and before day of *niſi prius* one of them dies, the plaintiff may ſuggeſt the death of one of them at the trial, and upon entry thereof proceed againſt the other; and a defendant may at a day of *niſi prius relicta veri-*

A *retraxit* is only an agreement not to proceed, and not a confeſſion of having no cauſe of action.

If ejectment be againſt two, one dies, ſuggeſtion may be of it, and proceed againſt the other.

ficatione

ficatione cognovit actionem, and that may be entered by a Judge of *niſi prius*; and why may not he as well enter a *retraxit*; for all the parties are demandable at the day of *niſi prius*, and an entry of their appearance is always on the *poſtea*, and the plaintiff is demandable before the jury give their verdict; and ſurely the Judge may as well record a *retraxit*, whereby the plaintiff agrees to ceaſe his proſecution for ever, as a *cognovit actionem* of the defendant's ſide, or a nonſuit of the plaintiff's. *Vide Co. Ent.* 172. as to recording of *relictâ verificatione cognovit actionem.*

Cognovit actionem may be entered at *niſi prius.*

And it was alſo ſaid, and indeed not denied, that if there be two defendants in treſpaſs, and they plead "not guilty," and at the trial one of them *relictâ verificatione cognovit actionem*, that the Judge muſt record it, and proceed againſt the other; which was ſaid by GOULD, *Juſtice*, to be the ſame in effect with this caſe.

And then as to his power of trying the iſſue againſt the other, was quoted 2. *Rol. Abr.* 630. *pl.* 13. Two coparceners in a real action, and one of them is nonſuited at the aſſize, * the Judge of aſſize may record the nonſuit, and try againſt the other; and if the defendant had ſevered in plea, the plaintiff might be nonſuited againſt one, and proceed againſt the other; and ſo is the caſe in 1. *Cro.* 243. And ſo he may enter a *retraxit* againſt one, and proceed againſt the other; for a *non proſ.* does not amount to a releaſe. *Ibidem.* And it was ſaid, that this was only an action of treſpaſs, which was in its nature ſeveral; and therefore though the defendant did jointly plead not guilty, yet that plea would be taken, as the nature of the action, diſtributively; as much as if each defendant had pleaded not guilty; in which caſe, a *retraxit* might well be againſt one, and proceeding againſt the other. *Vide* 11. *Hen.* 7. 6. 1. *Cro.* 243. is againſt *Hob.* 180. that *non proſ.* before judgment is no releaſe, and is law, *vide* 3. *K. b.* 136. *acc.* to *Cro. a.*

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Non proſ. does not amount to a releaſe.

HOLT, *Chief Juſtice*, agreed the caſe in 1. *Cro.* 243. to be law; but ſaid there was great difference between a ſeveral plea and a joint one; for where many join in a plea, there goes but one *venire facias*, but if they ſever, there ſhall be ſeveral *venire fac.*; or if there be but one, it muſt be ſpecial, and it muſt be mentioned to be for the trial of ſeveral iſſues. And it is true, in treſpaſs againſt many, and not guilty pleaded by all, it is ſo far a ſeveral iſſue, that the jury may find ſome guilty, and acquit the reſt, though all join in the plea, for the words are, "*veniunt et dicunt quòd non "ſunt inde culpabiles.*" If a Judge of *niſi prius* allow or diſallow a challenge, it is all *ſub modo*; for if he allows it, when it ought not to be, or *vice verſâ*, and that appears on the *poſtea*, the trial ſhall go for nothing; but as to things of neceſſity, he is to allow them; as of pleas *puis darrein continuance*, as releaſe between day of *niſi prius* and day in bank; becauſe the defendant has no other time to plead it than at *niſi prius*, for that the day of *niſi prius* and day in bank, as to pleading, are the ſame; and in ſuch caſe, all he has

Where ſeveral join in a plea, there is but one *venire*; if ſever, there muſt be ſeveral *venire's.*

Day of *niſi prius* and day in bank, as to pleading, are the ſame.

GREE *againſt* ROLLE.

has to do is to receive the plea and return it upon the *poſtea*, for the Judges of courts above to judge of. And after the ſtatute of *Niſi prius*, and till the ſtatute of *York*, a Judge of *niſi prius* could not record a nonſuit; and therefore during all that time none could be nonſuited at *niſi prius*; and if that ſtatute does not enable him to record a *retraxit*, how can he do it? And ſurely this entry of a *retraxit* is not a matter of neceſſity; for in this caſe now before us, the jury might acquit him that would not confeſs leaſe, entry and ouſter, and give a verdict againſt the other, and that had been
* [655] the true way And beſides, * the party might have entered his *retraxit* above, and therefore likewiſe it was no matter of neceſſity to have it done at *niſi prius*; and he ſaid this was a maggot that could not crawl. And he ſaid, that he was not ſatisfied with the caſe before put, that one could not plead excommunication in the plea *puis darrein continuance*, at *niſi prius*. And he agreed, that a *retraxit* was not a confeſſion of want of cauſe of action, but only an agreement on record to ceaſe proceedings againſt that defendant; and yet in that caſe, if he may proceed againſt the other defendant, as he may in ſome caſes, he ſhall recover his poſſeſſion and damages againſt him; and if, by virtue thereof, he would moleſt the poſſeſſion of him, againſt whom the *retraxit* is entered, he ſhall therefore maintain treſpaſs againſt him; and beſides, if it be done by fraud, the Court upon motion will ſet it aſide. And whereas the cauſe in 2. *Vent.* 105. was quoted, where in ejectment againſt two, one of them would not confeſs leaſe, entry and ouſter, or does not appear, the plaintiff was nonſuited againſt both, and had coſts taxed againſt him; and it is ſaid, that he that would not appear, had an intereſt in the coſts, and might releaſe them. HOLT ſaid, if there be two defendants in ejectment, and they enter into the common rule, and at the trial they will not confeſs leaſe, entry and ouſter, the plaintiff ſhall be nonſuited, but ſhall have judgment againſt the caſual ejector; but if one of them only does refuſe to confeſs it, he ſhall be acquitted, and the plaintiff, if he ſhew title, ſhall recover the whole againſt the other. And if judgment be againſt the caſual ejector, and it be made appear that no declaration was rightly ſerved, the Court will ſet it aſide. And if at common law an ejectment had been againſt one that had nothing in the land, and upon judgment againſt him another is turned out of poſſeſſion, there was no remedy for the right owner but treſpaſs, or a writ of deceit; and this ſtill is all the certainty any man has of his poſſeſſion; and now all we can do is to ſet ſuch recovery aſide, and to puniſh the offender. And he confeſſed the caſe of the defendant's *relictâ verificatione cognovit actionem*, that by the Judge of *niſi prius* it may be recorded; but he ſaid, that was becauſe there it would be in vain to try the iſſue; but it was never attempted, that where there were two defendants and *non proſ.* entered againſt one of them, that the plaintiff could proceed againſt the other, but where they ſevered in pleas. And he remembered *Hob.* 70. 180. 1. *Cro. Walſh v. Biſhop*; and the ſame
* [656] in 1. *Bulſtrode*, and a caſe * in the year 1650. Ejectment againſt two,

two, one confeſſed the action, and the other pleaded not guilty, and it was queſtioned, whether the plaintiff might enter a *non proſ.* againſt one of them, and have judgment againſt the other; and then it was held he could not; and a difference was taken between treſpaſs and ejectment, but he ſaid he did not take that to be law; or that the writ ſhould abate by a *non proſ.* againſt one; or that there was any difference between treſpaſs and ejectment, in that point. *Vide Raſt. Ent.* 66. 72. Affize againſt two, the one is found guilty, and the other acquitted, and judgment and damages againſt him that was acquitted, and for the other; and the precedent in 3. *Co.* 50. *Sir George Brown's Caſe* is in point, ſo in caſe of ejectment, and why may it not be ſo in this caſe? He agreed, in ejectment they could not be nonſuited againſt one, and proceed againſt the other; but if there be two defendants, and one of them will not appear, or will not confeſs leaſe, entry and ouſter, he may be acquitted, and the plaintiff proceed againſt the other; and he who is acquitted is a party to the record, and if he cannot have a writ of error, it is becauſe he is not hurt by the judgment; and if there could be a verdict againſt him, he ſhould have a writ of error; and if there had been an actual ouſter, as formerly, he ſhould have a writ of error. If one confeſs leaſe, entry and ouſter for as much of the premiſes as are in his poſſeſſion, the jury ſhall inquire againſt him alone for ſo much; and if the other will not appear, or not confeſs, &c. there ſhall be judgment for ſo much of the premiſes as are in his poſſeſſion, judgment againſt the caſual ejector. And where one will not confeſs leaſe, entry and ouſter, he ſhall be acquitted; and that will be as well for the plaintiff, for as to him he may have the Judge's certificate for judgment againſt the caſual ejector. If one be nonſuit for the defendant's not confeſſing leaſe, entry and ouſter, upon certificate thereof there muſt be judgment againſt the caſual ejector; and may not his certificate of an acquittal for the ſame cauſe have the like effect? And if there be ſeveral defendants, and ſome confeſs for all in their poſſeſſion, and there be others will not do it, let them that will not be acquitted for that reaſon, and the trial go on as to the reſt, and judgment be for ſo much upon the verdict, and for the reſt againſt the caſual ejector; and that will fetch the poſſeſſion equally well for the plaintiff. And he ſaid in my *Lord North's* time, if there were ſeveral defendants, and one of them would not confeſs leaſe, entry and * ouſter, the plaintiff was nonſuited againſt all, and had judgment for the whole againſt the caſual ejector; and that he ſaid was hard, to turn one out of poſſeſſion for the default of another, who was willing to defend his title. And he ſaid he never knew a *non proſ.* againſt one when two had joined in a plea entered at *niſi prius*, but it might be done above, and a *diſtringas* taken out as to the other only.

Gree *againſt* Rolle.

In ejectment cannot be nonſuited againſt one, and proceed againſt the other.

If one defendant will not appear, or confeſs leaſe, &c. he may be acquitted, and plaintiff proceed againſt the other.

As to him who will not appear, judgment ſhall be againſt the caſual ejector for ſo much on the Judge's certificate.

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At laſt it was held well by Gould and Powis, *Juſtices*, againſt Holt, *Chief Juſtice*; and error was brought before the lords, and judgment affirmed.

Caſe 1057.

Craddoc *againſt* Glin.

On ſuit brought againſt an attorney for money received to the plaintiff's uſe, moved to have his own bill taxed, and an allowance of what was due. Court will not interpoſe.

ACTION againſt an attorney for money received to the plaintiff's uſe.

The attorney ſhewed to the Court that he had been employed as an attorney for the plaintiff, and had applied ſome of his money towards paying for his labour, and ſome to a ſolicitor in the cauſe; and moved to have his bill taxed, and an allowance of what ſhould then appear due to him.

CURIA. If the plaintiff had applied by motion to have us to compel an attorney, by virtue of our power over him as our officer, to pay the money, there, foraſmuch as that is diſcretionary in us, we would not help the plaintiff unleſs he did the fair thing of his ſide; but here when he demands no favour of us, we cannot deny him the law, and let the defendant take his legal remedy againſt the plaintiff (*a*).

(*a*) But ſee now the ſtatutes of 2. *Geo.* 2. c. 22. the 8. *Geo.* 2. c. 4. and the caſe of Mitchell *v.* Oldfield, 4. Term Rep. 123.

Caſe 1058.

Johnſon *againſt* Allen.

One tenant in common may maintain ejectment againſt the other.

PER CURIAM. If two tenants in common be, and one of them do actually ouſt the other (*a*), he may maintain an ejectment againſt him, and he ſhall not be admitted a defendant without confeſſing leaſe, entry and ouſter.

And in that caſe the plaintiff ſhall only recover his purparty *pro indiviſo*, and ſhall be put in poſſeſſion of no more.

In ſuch caſe no mean profits to be recovered.

And in ſuch caſe the ſheriff ſhall give the ſame execution as he would do of rent upon aſſize, and there can be no mean profits at all recovered in caſe of tenants in common.

But if one enter only upon another, claiming only as tenant in common, and the other brings an ejectment, it will be hard to enforce the defendant, who has done nothing but as tenant in common, to confeſs leaſe, entry and ouſter (*b*).

* [658]

And here IT *WAS RULED, that there ſhould be a confeſſion of leaſe, entry and ouſter, in caſe it ſhould appear to be an actual ouſter upon evidence at the trial; *ſecus* not.

To obſtruct making the utmoſt profit of his moiety is an ouſter.

And IT WAS AGREED, that to obſtruct one to make the utmoſt profit of his moiety, would amount to an ouſter, but not to conſent to have the rents raiſed upon the tenants would not.

(*a*) See *accord.* Fairclaim, on the Demiſe of Empſon, *v.* Shakleton, 5. Burr. 2604. Doe, on the Demiſe of Fiſher and Taylor, *v.* Proſſer, Cowp. 217.

(*b*) Hob. 120. Co. Lit. 242.

Vaſpor

Vaſpor *againſt* Edwards.

Caſe 1059.

TRESPASS *quare clauſum fregit*, and fed his graſs with a pig.

If diſtreſs eſcapes, the perſon diſtraining cannot bring treſpaſs, unleſs he ſhews the eſcape was without his default.

S. C. 1. Salk. 248. S. C. Holt, 256. S. C. 1. Ld. Ray. 719. S. C. 11. Mod. 21. S. C. Blencowe's MSS. 214.

The defendant as to all, except the treſpaſs by the pig, pleads not guilty; and as to that, that the plaintiff ought not to have his action, for that he had taken the pig *doing the damage*, and impounded it in a common pound at *J.* and there the ſaid pig *ex cauſâ præd. detinuit.*

The plaintiff confeſſes the taking and impounding, but that afterwards the pig, without his conſent and will, did eſcape out of the pound.

And upon this a demurrer.

THIS CASE depended a long time, and was ſeveral times ſpoke to at the Bar.

IT WAS SAID, *to maintain the replication*, that a diſtreſs is but a pledge (*a*), and if one be defeated of his pledge, and has no remedy over, he ſhall have recourſe to his original remedy for the thing for which the pledge was taken. If one bail goods as a pledge for money, and the bailee be robbed of them, he ſhall maintain an action for the money. And here is no default in the plaintiff, for he could do no more than to impound it; and he could not juſtify the tying of it, ſo as to ſecure it from eſcaping; *vide* 27. *Aſſ. pl.* 64. And the whole default is in the defendant: FIRST, In doing wrong to the plaintiff; and again, by not tendering amends, whereupon he might have his hog again; *vide* 2. *Inſt.* 341. And if the plaintiff is defeated of his diſtreſs, through the fault of the defendant, he may diſtrain *de novo*; as if a diſtreſs die in the pound overt for want of food, the diſtrainer may diſtrain *de novo*; *vide Dy.* 280. *b. Hob.* 61. 15. *Edw.* 4. c. 10. *Ergo* he may alſo bring treſpaſs if he pleaſe. And if debt be brought for rent iſſuing out of land in the ſame county, levied *per* diſtreſs without more will not be a good plea; but he muſt alſo make a ſpecial concluſion *et ſic riens arriere*, ſo that the taking the diſtreſs and detaining thereof is not the material matter, but the rent's not being behind; and where no ſuch concluſion is, the lands are in another county, and then it would not be * material to make ſuch ſpecial concluſion, becauſe the rents being behind cannot be tried by men of the county where the action is brought. 22. *Hen.* 6. 13. *pl.* 9. 36. *Hen.* 6. *pl.* 1. 35. *Hen.* 6. 10. *Raſt. Ent.* 175. *Co. Ent.* 49.

1. Inſt. 89. 2. Cro. 245.

If diſtreſs die in pound overt for want of food, may diſtrain *de novo*,

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TO THIS *it was ſaid*, that in this caſe the plaintiff had his choice to diſtrain or bring treſpaſs; and when he has made his election, when has made election, ſhall have no other remedy, unleſs that be ineffectual by the act of God, or the party.

Perſon may diſtrain or bring treſpaſs, but

(*a*) See 2. Leon. 174. that a diſtreſs is but a pledge.—NOTE *in MS.*

and

VASPOR *against* EDWARDS.

and taken a diſtreſs, he ſhall never have recourſe to any other remedy till that remedy proves ineffectual through the act of God, or the wrong of the defendant, neither of which has happened here; and therefore the caſe of the diſtreſs dying in the pound for want of food, that is in a pound overt, or dying in any pound by any other chance, without default of the diſtrainer, is not like this: If the defendant had brought a replevin here, the ſheriff muſt have returned an *elongatur*, and could not return the eſcape; *vide* 5. *Hen.* 7. c. . but he may return that they eſcaped, and came back to the owner; *vide Br. tit. Return*, 75. And here it does not appear that the pig came back to the defendant again, which ſhews the plaintiff is not diſcharged of it, nor we chargeable for the treſpaſs for which he is ſuppoſed to have a diſtreſs; and for which, if a replevin were brought, and an *elongat.* had been returned, as it ought to be, a *withernam* would go againſt the plaintiff of his own cattle. And if this had been a caſe of rent, levied *per* diſtreſs would be a good plea; for the meaning of that plea is not that the money is actually paid, for then *nihil debet* or *riens arriere* had been the proper plea, for the meaning of it is, that the party has taken a diſtreſs, and ſtill has it as a gage for his rent: And it was ſaid, the eſcape here was through the default of the diſtrainer, for he might have put the diſtreſs in a ſafe pound; which if it were broke, he had a remedy by a *parco fracto*; or if this be the common pound, and not capable of holding the diſtreſs, it was his folly to make uſe of it, when he might put it into any other ſafe place, and make that his pound; or perhaps he may have remedy againſt the lord for not maintaining a ſufficient pound; ſo that ſtill he is at no prejudice, or at leaſt it is ſuch a one as comes through his own default, and then he may thank himſelf for it; for it was alſo denied that the diſtrainer could not tie the diſtreſs, but it was agreed it will be at his peril, if through ſuch tying the diſtreſs comes to any hurt, for then he muſt anſwer for it; and the caſe of 27. *Aſſ.* warrants no more; for the diſtreſs muſt be in a convenient pound, and if it be not ſuch, and a diſtreſs is put into it and abuſed, though it be * what is called a common pound, the diſtrainer ſhall anſwer for it. And therefore if a live beaſt be put into a place in which there are ſharp ſpikes, by which the beaſt is ſtuck, though it be a public pound, the diſtrainer ſhall anſwer for it, for it is his pound, and it is he ſhall have a *parco fracto* for the breach of it, and not the lord; *vide Doct. & Stud.* c. 27. And it was ſaid, there were but two ſorts of pounds, *viz.* overt and covert; overt where the owner may come and feed them without being a treſpaſſer, and covert where he cannot have ſuch acceſs. If the cattle die in a pound overt for want of fodder, or without any default in either party, the loſs is the owner's, which ſhews, that if they die through any default of the diſtrainer, as for want of food in a pound covert, it is at his peril; ſo of other defaults, as may be reaſonably collected from the ſaid book of *Doct. & Stud. ubi ſupra.* And it was ſaid that

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A common pound is the pound of the diſtrainer, and to anſwer for all the miſchief cattle ſuffer by its being a bad one.

If cattle die for want of food in a pound overt, the loſs is the owner's.

that a pound was not like a common gaol, or a hayward like a gaoler, but only a common ſervant to all that uſed the pound.

To all which HOLT, *Chief Juſtice*, ſtrongly inclined. And he added this diverſity between *rent* and *damage feaſant*, for one may diſtrain any cattle he finds on the premiſes for rent, but in the other they muſt be actually doing damage, and are only diſtrainable for the damage they are then doing, and continuing; for if they have done damage to-day and gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for that damage, the party cannot juſtify keeping them for the firſt damage: And he ſaid farther, that if ten head of cattle are doing damage, one cannot take one of them and keep it till he be ſatisfied for the whole damage, but may bring treſpaſs for the reſt. And he ſaid, that if diſtreſs be ſtole or ſet at large by a ſtranger, he ſhall not be anſwerable for it; but even in that caſe if replevin be brought, and an *elongatur* returned, as it muſt be, there ſhall be a *withernam*, and the diſtrainer liable till he ſhew that matter, which being no default of his will excuſe him; and the plaintiff in replevin may work beaſts taken in *withernam*, becauſe they are delivered to him in lieu of his own; and when the matter is determined, if it go for the plaintiff in replevin he ſhall have judgment for the beaſts in *withernam*, if his own be not to be had; but if it be for the defendant he ſhall have his beaſts again, and may keep the diſtreſs till he be ſatisfied. And when one diſtrains *damage feaſant*, he has an adequate ſatisfaction for his damage till he loſe it without default * in himſelf, for when he has return irrepleviſable, he can have no other ſatisfaction but to keep the diſtreſs till he be ſatisfied. And *damage-feaſant* is the ſtricteſt diſtreſs that is, for the thing diſtrained muſt be taken in the very act; for if they are once off, though on freſh purſuit, you cannot diſtrain them. If tender be made of damages before the taking, the taking is unlawful, if after the taking, and before impounding, then the detainer after is unlawful; but tender comes too late after the impounding to make either the taking or detaining unlawful; but ſtill after the impounding the diſtrainer may take the amends, and let go the diſtreſs, if he pleaſe. And if a beaſt has done more damage than he is worth, let him not diſtrain, but rather take his action. And before the ſtatute of 23. *Hen.* 8. c. 15. no damages were given in avowry for *damage-feaſant*, but only a return irrepleviſable of the thing diſtrained.

Vide 1. Inſt. 161. a.

Beaſts taken in *withernam* may be worked, becauſe are given in lieu of the others.

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Diſtreſs for *damage-feaſant* muſt be in the very act.

And now this Term, after great conſideration, THE COURT delivered their opinions *ſeriatim*.

GOULD, *puiſne Judge*. The plea in bar is bad, and the replication good. If the diſtreſs had died in pound, though after judgment irrepleviſable, he might diſtrain a-new, or bring his action; for it is, as *Hobart* ſays, the effect of the agreement of the parties, or act in law, *Hob.* 61. 15. *Edw.* 4. 10. *Doct. & Stud.* c. 27.

for

VASPOR *against* EDWARDS.

for the party has the goods as a pledge, and as long as that continues he ſhall not have any other remedy; but once it ceaſes to be a pledge, his action is reſtored to him, and it is in his election whether he will retake his diſtreſs or bring his action of treſpaſs: If the owner break the pound, and let diſtreſs go, the diſtrainer ſhall have a *parco fracto*, or may retake the diſtreſs. 1. *Inſt.* 45. 34. *Hen.* 6. 18. If one diſtrain, and as he is driving to pound they eſcape, I may purſue and retake them, or bring treſpaſs, and the reaſon is the ſame here. If diſtreſs eſcape out of pound, the party may retake him, 27. *Aſſ. pl.* 64. but he cannot tie, for that would be a miſuſer, and would amount to a converſion. If the diſtrainant ſuffer the diſtreſs to eſcape by his own conſent, he diſcharges the treſpaſs; or if the defendant had alledged any default in him, that perhaps would alter the caſe; ſo that he concluded the replication was good. And the plea is bad, it is that *nomine diſtrictionis* he took and impounded; but that is not enough, for he ſhould have ſaid farther, that he ſtill does detain the diſtreſs. If a *ſcire facias* be brought upon a judgment, and the defendant pleads that he has been taken in execution, that will not be
* [662] enough, without ſaying farther, that he ſtill continues in * execution. *Raſt. Ent.* 175. Where a diſtreſs for rent is ſo pleaded, and ſhewed to continue, ſo here as long as it is ſhewed that the plaintiff has a gage or pledge, ſo long it is a bar, but the minute that gage ceaſes againſt the party's will, the action revives. And in all caſes where one pleads a plea, which to be good muſt be continued, there he muſt ſhew the continuance; as 12. *Hen.* 8. 2. 13. *Hen.* 8. 15. as if a man makes title under tenant for life, he muſt aver his life. *Yelv.* 223. And he held the return in replevin in this caſe might be made of the ſpecial matter, as well as if the diſtreſs had died in pound, or eſcaped and came back to the owner, which may well be done. *Vide Br. Return of Writs*, 125. *Dalt. Ret. Brev.* 104.

If cattle taken *damage-feaſant* eſcape out of pound, without default of diſtrainer, he has remedy.

POWIS, *Juſtice.* It would be of dangerous conſequence, if cattle taken *damage-feaſant* ſhould eſcape out of pound without default of him who did diſtrain, and that he thereby ſhould become remedileſs; for a diſtreſs, whether for rent or damage, is but a gage, 2. *Cro.* 148. and they could not be ſold at common law even in the caſe of rent, nor now for *damage-feaſant*; and the diſtrainer cannot uſe them though it be for their good, and therefore he cannot tan green hides to preſerve them, *Cro. Eliz.* 783. nor milch-cows to preſerve their milk, or ſave them from hurt, 1. *Rol. Abr.* 673. though it be allowed, 2. *Cro.* 148. that kine may be milked to prevent their being ſpoiled: But I take *Rolle* to be law; then if it be a gage, it is a gage for ſatisfaction; and if that be never made, why ſhall the party have no remedy if there be no default in him? for it is as true a rule, that one ſhall be ſatisfied once, as that he ſhall not be ſatisfied twice.

If cattle diſtrained be put in pound overt and die, action

If cattle diſtrained be put in pound overt, the owner at his peril muſt feed them; and if they die, the diſtrainer ſhall bring his action may be brought, or freſh diſtreſs.

action

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action or diſtrain again, *Dy.* 280. 1. *Inſt.* 47. *Doct. & Stud.* 102. and the reaſon of that is, becauſe he loſt his pledge without fault in him: Another reaſon why he ought not to loſe his remedy is, becauſe he cannot otherwiſe ſecure them than by impounding, for he cannot tie them; *vide* 27. *Aſſ ubi ſup.* So if they be ſtolen out of the pound overt he is not liable nor remedileſs; but if he ſhould put things into the pound overt which are not proper to be put there, and they be ſtole, he ſhall anſwer for them; but if they be proper for pound overt, the owner muſt keep them from thieves, as from ſtarving. 1. *Inſt.* 47. *b.*

So if ſtole out of it.

If diſtreſs be ſtole out of pound, and *elongat.* be returned, the diſtrainer to prevent a *withernam* may ſhew that * they were ſtolen, 32. *Hen.* 6. 27. *b. Br. Ret. Brev.* 135. *Nat. B.* 74. and ſome Books ſay the ſheriff may return it. If the cattle die in pound, he may diſtrain in caſe of rent, or bring debt; *ergo* if they die in caſe of *damage-feaſant* he may bring treſpaſs. 15. *Edw.* 4. 10. *Dy.* 280. *Hob.* 61. *Doct. & Stud.* c. 27. f. 112.

* [663]

But notwithſtanding all this, the action will not lie here, for want of this material word in the replication, that the diſtreſs eſcaped without default of him; for it is not enough his gage ſhould be loſt without his conſent, but it muſt be without his default too, to intitle him to an action. And he held the plea good, though the words *adhuc detinet* were wanting, for it is a plea in bar, and good to a common intent.

TURTON, *Juſtice.* The plea is good; the plaintiff had his election of two remedies, treſpaſs or diſtreſs, and uſing of one is an utter waiver of the other. 2. *Co. Sir Rowland Hayward's Caſe.* 9. *Co.* 51. and *Hob.* 59. an election of one is an implied rejection of the other. And diſtreſs ſufficient to ſatisfy the rent is a good plea in bar to debt for the rent; ſo by parity of reaſon in treſpaſs. And he concurred with POWIS, that the replication was bad for the cauſe above; and here was defect in the plaintiff to put the diſtreſs into ſuch a pound, when he might put it into a ſafer, as every-body muſt know he might have done; for a common pound of a manor cannot be looked upon ſafe for a pig; ſo he concluded againſt the plaintiff.

HOLT, *Chief Juſtice.* I always was of the opinion that now I am of, that judgment ought to be for the defendant; for it is plain there was a time when the plaintiff could not have maintained this action, *viz.* when the diſtreſs was taken; then the defendant has pleaded this matter, which did take away the action; and ſo a matter is pleaded which ſhews the plaintiff had not an original cauſe of action; and if the plaintiff will admit the truth of that matter, he ought to ſhew ſome ſpecial ſubſequent matter whereby he is now become intitled to that action, whereof he was originally ouſted by the plaintiff's plea, or remove the matter that is made a bar to him. And here the taking the hog *damage-feaſant*

As long as a diſtreſs is detained, it is a bar in treſpaſs.

feaſant is *prima facie* a bar of the action; and it is agreed, that if diſtreſs is taken *damage-feaſant*, as long as it is detained it is a good bar in treſpaſs.

Bar is good to a common intent.

But it is objected, that it is not ſhewn that the hog is detained ſtill; but ſurely a bar is good to a common intent, and it is enough for him that is diſtrained to ſhew a diſtreſs * taken, and it behoves the other ſide to ſhew how the poſſeſſion of it happened to be loſt, and ſince he has loſt poſſeſſion he knows beſt how; if he had ſhewn that the defendant had taken it out of pound, it might be ſomewhat, or even that it eſcaped out of pound and run home to the defendant, and that he came upon freſh purſuit to take it, and had been hindered by the defendant. And ſurely it is the default of the defendant that he put it in an ill pound; ſurely none will ſay, that if a hog be put into ſuch a pound as cannot keep it, and then it eſcapes, that he can afterwards bring treſpaſs; and it being a common pound makes not to the caſe; for be the pound common or not, it is the pound of him that uſes it for that time; and the law does not require a man to put the diſtreſs in a common pound, but only that it be put in a pound overt, or be fed at peril of the diſtrainer, and taken care of by him; and common pounds are either by cuſtom, tenure, or agreement among the inhabitants of a vill or manor, and not by common law. But if there be a common pound, and one will uſe it, he muſt take care to keep it; and if it be broke he ſhall have a *parco fracto*, though it be another man's pound, as in another man's cloſe, which ſhews it to be the pound of him that uſes it as ſuch. Then he ought to keep his pound, or if it be out of repair, and he put cattle in it, and they eſcape, is it reaſonable he ſhould take advantage of his neglect? Surely it is not; for the diſtreſs is for his benefit, and the law appoints none elſe to take care of it; and though ſome pounds have naywards, who are officers in leets, yet the law takes not any notice of them.

* [664]

Diſtreſs is not obliged to be in a common pound, but in pound overt.

If pound overt be broke, *parco fracto* lies, tho' in another's ſoil.

And to ſay that he does not ſhew in the bar that the plaintiff does detain it yet, it may be he does not detain it; for ſuppoſe it be replevied, the plaintiff's way would be to avow, and pray return for the damage; and if pending the matter upon the replevin this action were brought, would you have it ſet forth in pleading this matter, that he ſtill detains the hog? That would be falſe in fact; ſo the plea, *prima facie*, is good till it be avoided; as levied *per diſtreſs, et ſic nihil debet*; and though the precedent in *Raſtall* be *et adhuc detinet*, yet that is no matter triable, but the taking the diſtreſs is what is triable: And ſo it was there, for if a man diſtrain for rent or *damage-feaſant*, upon replevin he muſt juſtify the taking, and not the detainer; and then, if upon the avowry it appear that he had good cauſe, he ſhall have return; if the diſtreſs be eloined or embezzled, there ſhall go a *withernam* upon that matter * returned on the *return habendo*; ſo if there might be a replevin, whereby the plaintiff would be diſpoſſeſſed of the diſtreſs till return, that would diſcharge the action: And when

* [665]

it

it is pleaded that he diſtrained the cattle, it ſhall be intended that he has them ſtill, or that there is a replevin pending; or if it be otherwiſe, it ought to come of the other ſide; for if the diſtreſs be taken from him by replevin, as it well might be, that will not revive the action of treſpaſs: If it eſcaped through his own defect or neglect, that will not revive the action. And here he once had the diſtreſs in his poſſeſſion, and is beſt able to give an account of what is become of it; and if he does not ſhew that he has loſt it by ſome means whereby the action is revived, it ſhall be intended to continue diſcharged. And here it does not appear how the eſcape was, but only that it was without the conſent and will of the plaintiff; and all that might be, and yet be through his neglect; and if ſo, the action not revived. And ſuppoſe the door of the pound had not been locked, whoſe fault is it? Is it not the fault of the plaintiff, who ought to have ſhut it? So the defendant has ſhewn a diſtreſs, which is *prima facie* a diſcharge of an action of treſpaſs; then the plaintiff ought to ſhew how it came to be revived. If cattle die in pound, it is true the action is revived; why? becauſe it is the act of God; ſurely then there is a great difference between the death of the diſtreſs in the pound, without the default of the diſtrainer, and an eſcape of them, which muſt happen through his default, and be taken ſo till he ſhew the contrary. And the difference between an eſcape of a diſtreſs out of pound, through neglect or other default of the diſtrainer, and without his default, is ſo material, that in one caſe the action of treſpaſs, &c. ſhall be revived, and in the other not. And I always heard a bar was good to common intent; becauſe it is to excuſe from a charge; but a replication muſt have a general certainty, becauſe it is to deſtroy the excuſe of the defendant, which is always received favourably.

If eſcape out of pound without diſtrainer's fault, action of treſpaſs revives, elſe not.

And judgment was given for the defendant.

The King *againſt* The Village of Andover.

Caſe 1060.

THEIR CHARTER is, that the mayor and major part of the corporation may turn out whom they pleaſe.

Charter of *Andover*.

And PER CURIAM, after argument, There is no remedy for it, their conſtitution being ſo.

* Anonymous.

Caſe 1061.

HOLT, *Chief Juſtice*. If one attorney give leave to another to practiſe in his name, he ſhall anſwer for all the villanies and practices as he ſhall act in his name (*a*).

Attorney, who gives another leave to practiſe in his name, is anſwerable for what is ſo done.

(*a*) See 2. *Geo.* 2. c. 23. Oppenheim v. Harriſon, 1. Eſtr. 20 and 1. Com. Dig. "Attorney" (B. 15.).

Anonymous.

Caſe 1062.

Anonymous.

Mandamus will not lie to ſwear in a ſteward of a copyhold court.

5. Com. Dig. "Mandamus" (A.). (B.).

MULSO moved for a *mandamus* to ſwear in a ſteward of a copyhold court (*a*).

HOLT, *Chief Juſtice.* The true reaſon of *mandamus* was when aldermen, capital burgeſſes, or ſuch other officers concerning the adminiſtration of juſtice, were kept out, to ſwear them into, or at leaſt reſtore them into their places; and we ought not to grant it to ſwear a regiſtrer for a biſhop, though it be an office of a public nature (*b*); and he ſaid he would not care to do it for the ſteward of a leet, though heretofore it were uſed to ſwear a phyſician of the college (*c*); and it is rare to grant it where one has any other remedy (*d*); and here it is a private officer to do ſervice for the lord.

And it was not granted.

(*a*) That a *mandamus* lies for the ſteward of a court leet ſee 1. Sid. 40. 169. Ray. 12. 2. Lev. 18. 2. Stra 948. 1207. 1. Will. 283. but not to reſtore the ſteward of a court baron, Fitzg. 194.

(*b*) Rex *v.* Ward, Stra. 893.

(*c*) 1. Sid. 29. Carth. 92. *Sed vide* 2. Show. 178. 1. Lev. 19. *contra.*

(*d*) See Rex *v.* Barker, 3. Burr. 1265. Rex *v.* Wheeler, B. R. H. 99.

Caſe 1063.

Taylor *againſt* Reignolds.

Conuſance of pleas no good return to a *hab. corpus.*

S. C. Forteſ. 244.

Ante, 643.

Salk. 148.

TO a *habeas corpus* to the ſtannary courts it was returned, that they have conuſance of pleas by the charters of *Edward the Firſt*, and another of *Edward the Third*, and that this matter might be well returned were quoted *Style*, 255. 1. *Roll. Abr.* 547, 548.

HOLT, *Chief Juſtice.* Conuſance of pleas, or exempt juriſdiction, were never returned to a *habeas corpus*; for then they might return a falſity to ſupport their juriſdiction, which would not be traverſable, and ſo a ſubject would be ouſted of the privilege of ſuing, or being ſued, in the king's ſuperior court, without an opportunity of controverting the matter; and he quoted the caſe of *Biſhop v. Percival.* And as to an exempt juriſdiction, that always is for the benefit and eaſe of the reſiants within ſuch a vill, borough, &c. not to be ſued out of their vill, &c. and then ſurely they may waive that benefit, and remove their cauſes to the ſuperior courts. And if one, who is within an exempt juriſdiction, be impleaded out of it, his way is to plead it, and the lord has nothing to do with it; but as to conuſance of pleas, that cannot be pleaded by a defendant, but muſt be demanded by the lord of the franchiſe, his bailiff or attorney.

If one who is within an exempt juriſdiction be ſued out of it, he muſt plead it.

Conuſance of pleas cannot be pleaded, but muſt be demanded by the lord.

Vincent

* Vincent *againſt* Preſton.

Caſe 1064.

PER CURIAM. When once a thing is made a *concilium*, one cannot enter judgment, or make any other alteration, without leave of the Court; and the caſe of *Croſgate v. Green* was quoted, which was, Two breaches were aſſigned in covenant, and an anſwer only to one of them, and for that a demurrer; but before it was put in the paper, judgment was by *nihil dicit* entered upon that which was not anſwered, and well; and all the difference between that and this is, that here it is made a *concilium*; and yet judgment by *nil dicit* entered without leave of the Court. And it being again moved by the Attorney General, who ſeemed to ſatisfy the Court, that the judgment might be well entered for that part of the declaration which was not anſwered in the ſame Term, though it was pretended to be a diſcontinuance; yet becauſe they had entered it up without coming to the ſecondary, which is irregular, it being a judgment for want of plea, the judgment was ſet aſide.

Where a thing is made a *concilium*, judgment cannot be entered without leave of the Court.

S. C. ante, 603. Tidd's Pract. 257. 260. 475.

Taylor's Caſe.

Caſe 1065.

THE QUESTION, in a motion made by MEADE, was, Whether a ſervice of a declaration in ejectment on *Sunday* were good now upon the ſtatute of 29. *Car.* 2. *c.* 3.?

Declaration cannot be delivered on a *Sunday*.

And PER CURIAM, It is not; for it is a proceſs, though not a judicial one; for it is compulſive on the party to appear; and it may as well be ſaid, that ſervice of a ſummons in a real action may be good on *Sunday (a)*.

(*a*) See Brookbank *v.* Allenſon, ante, 275. Waldegrave's Caſe, ante, 606. Walker *v.* Town, Bar. K. B. 300. Cornwallis *v.* Heyle, Fort 373. Swan *v.* Broome, 1. Black. Rep. 526. S. C. 3 Burr. 1595. S. C. 6. Brown's P. C. 132. and Morgan *v.* Johnſton, 1. H. Bl. Rep. 628.

The Pariſh of Halſtead *againſt* The Pariſh of Melford.

Caſe 1066.

AN ORDER to remove a wife and children to the place of the huſband's laſt legal ſettlement:

Order to remove a wife and children to the ſettlement of the huſband, ill.

And it was held bad as to the children, for they might have a legal ſettlement different from the huſband, but it might ſtand as to the wife.

2. Salk. 528.

Fort. 322. 313. Foley, 269. Stra. 580. Burr. S. C. 153. and ſee the whole law reſpecting the ſettlement by parentage, 1. Conſt's P. L. 19 to 64. 2. Conſt's P. L. 773.

But ANOTHER EXCEPTION was, That there was no adjudication that any of them were likely to become chargeable to the pariſh from whence they were removed: and though it was ſaid, that they came to ſettle there contrary to law; yet for the laſt exception the order was quaſhed *in toto*.

An order muſt ſtate the dauper likely to become chargeable.

2. Salk. 491. 530.

Sett. & Rem. 39. 21. 1. Stra. 77. 527. 2. Conſt P. L. 772 to 780.

(*a*) But now by 35. *Geo.* 3. c. 101. no perſon can be removed until actually chargeable.

Caſe 1067.

* The King *againſt* The Pariſh of Minton.

Order confirmed on appeal is final to that pariſh; ſo if it be not appealed from.

PER CURIAM. If one pariſh make an order for the removal of a poor perſon to another pariſh, and that order is confirmed upon an appeal, that pariſh is for ever concluded againſt all other pariſhes; ſo is an order made, and not appealed from, final.

S. C. Salk. 527. S. C. 3. Salk. 260.

But the exception was taken, that the appeal, on which an affirmation is final, ought to be to the *general quarter-ſeſſions*, and here it was ſaid to be at the *quarter-ſeſſions*, without more.

S. C. Sett. & Rem. 228. S. C. Holt, 577.

But foraſmuch as it did appear to be at the ſeſſions held on ſuch a day, which was the very day appointed by the ſtatute for the holding of the general quarter-ſeſſions, the Court would intend it the general quarter-ſeſſions *(a)*; *multum renitente* HOLT, *Chief Juſtice*: For ſince the act gave the appeal to a particular juriſdiction, they that would go upon that ſtatute ought to purſue it preciſely, and expreſsly ſhew it, without leaving any room for intendment.

(*a*) See Rex *v.* Shaw, ante, 203. and the Note of Rex *v.* Chiſholme, ante, 203. *notis.*

Caſe 1068.

The King *againſt* Biſhop.

Outlawry of murder on confeſſion of attorney general that had no lands.

S. C. ante, 626. Ante, 544, 545.

HE came to reverſe an outlawry of murder, and upon confeſſion of THE ATTORNEY GENERAL that he had no lands or tenements, which confeſſion recited, that it ſo appeared to him on affidavits, the outlawry was reverſed for the common error, that the Court was not ſaid to have been held *pro com.* So it was reverſed without any *ſcire facias* to the lords immediate and mediate; and he was ſent priſoner to the *Old Bailey*.

Caſe 1069.

Anonymous.

If one defendant in treſpaſs die *puis darrein continuance*, and at trial his default be recorded, his death may be ſuggeſted, and judgment had againſt the other.

HOLT, *Chief Juſtice*. In treſpaſs againſt two, and after iſſue joined, and *puis darrein continuance*, one of them dies; the plaintiff may at the trial get his default recorded, and proceed to trial, and have a verdict againſt the other; and he may before judgment come and ſuggeſt the death of the defendant who died, and have judgment againſt the other. And taking the inqueſt againſt one, where there are two defendants, and one of them dies, *puis darrein continuance* cannot be error, if the default of the other be recorded, and his death be ſuggeſted before judgment; and one cannot plead death of a party in abatement, *puis darrein continuance*.

AT

A T

THE SITTINGS

AFTER

HILARY TERM,

IN

The Thirteenth of William the Third,

AT

Guildhall,

BEFORE

Sir John Holt, *Knt. Chief Juſtice.*
Sir Edward Ward, *Knt. Chief Baron.*
Sir Henry Hatſell, *Knt. Senior Baron.*

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* The City of London *againſt* Wood.

Caſe 1070.

Debt on a by-law in the mayor's court for refuſing to ſerve as ſheriff. Ante, 269.

IN AN ACTION brought in THE MAYOR'S COURT againſt *Wood* for four hundred pounds as a forfeiture, for that he being duly choſen ſheriff did not ſerve, or otherwiſe diſcharge himſelf by fining, &c. according to the act of common council made in the ſeventh year of *Charles the Firſt*, it appeared *the plaint* was levied in the court of the mayor and aldermen on the fifteenth of *November*, and that the defendant gave bail for his appearance the next day, *viz.* the ſixteenth; and inſtead of continuing from the fifteenth to the ſixteenth, that day is given from the ſaid fifteenth to a certain day in *June*; and then the entry is, that the cauſe was removed by *habeas corpus* to the common pleas, and ſent down by *procedendo*. And then the defendant pleaded "*nil* "*debet*," "*et hoc parat. eſt verificare, ut liber homo* of the city," and offers to bring ſix freemen of the city to be his compurgators; and a demurrer to this plea; and judgment againſt the defendant; of which this error is now brought before the ſaid Judges commiſſioners.

THE CITY OF LONDON *againſt* WOOD.

HATSELL, *one of the Barons of the Exchequer*, who argued firſt, divided the caſe into four points:

FIRST, Whether *wager of law* held in the caſe?

SECONDLY, Whether there were *a diſcontinuance?*

THIRDLY, In caſe there were *a diſcontinuance*, whether it was now amendable by the record in the mayor's court, ſuppoſing that to be right?

FOURTHLY, Whether this action be brought in a proper court, *ſcilicet*, that of mayor and aldermen, it being for a forfeiture to the city?

Wager of law will not lie.

And PER LUY, Wager of law lies not here, for that never lies but in reſpect of the weakneſs and inconſiderableneſs of the plaintiff's ground or cauſe of demand; and when the ground of his demand is ſo ſmall and weak that the defendant's oath, and that of compurgators, may be looked upon as an equal conſideration with it, then a wager of law may well be; but never where the foundation of the demand is of greater regard than the defendant's oath, then it never lies. 1. *Inſt.* 295. it lies not where there lies a ſpe-
* [670] cialty or deed to charge the defendant; * but only where the cauſe of action is only a bare parol tranſaction, which as it may create a duty, yet it is ſuch a duty as may be diſcharged in the ſame manner that it is contracted; and the reaſon of it is grounded upon the preſumption of law, that one for no worldly conſideration will forſwear himſelf; and it is an argument that the matter is of no great value, that the plaintiff did not take care to have better ſecurity for it than the ſlippery memory of man, and the incertainty of a verbal contract: ſo that ſince the lien or tie was ſo light, it is no wonder if the law will lightly diſcharge it. Another reaſon of a wager of law is laid down in 2. *Inſt.* 45. *b.* that the defendant might have witneſſes of his diſcharge, who might be dead, as no one can keep his witneſſes alive; and ſince nothing appears to charge him but a parol agreement, which might have been diſcharged with the like ſolemnity, which the defendant might have proved if his witneſſes were not dead, for that reaſon too the law thought convenient to admit of a diſcharge by wager of law. Nor is there any hardſhip in all this, becauſe the plaintiff might have prevented it by providing a ſpecialty; but he held the firſt reaſon to be the only true reaſon, *viz.* the feebleneſs and exility of the ground of the plaintiff's demand; and it ſuffices, that the nature of the defendant's diſcharge be of equal validity with the ground of the plaintiff's charge. And wager of law is allowable in five caſes: firſt, In debt upon ſimple contract, which is the common caſe; ſecondly, In debt upon an award upon a parol ſubmiſſion; thirdly, In an account againſt a receiver for receipts by his own hands; fourthly, In detinue, though the bailment were by the hands of another; fifthly, In an amerciament in a court-baron, or other inferior courts not of record. And in every of theſe inſtances the action

Vide 2. Saund. 65.
Sid. 160.
1. Keb. 599.
Vide Rol Ab. 240.
8. Co. Beecher's Caſe.
Mo. 276.

is

is grounded upon a feeble foundation, and of ſmall conſideration in law. THE CITY OF LONDON *againſt* WOOD.

The caſe of an amerciament in court-baron is neareſt to the preſent caſe of any, though nothing like it, for ſuch amerciaments are generally for private matters, as incloſing or over-charging of commons, or other private tranſgreſſions; but this offence, for which the penalty is laid here, is of a public nature, and concerns the adminiſtration of juſtice in the ſervice of ſheriffs of *London* and *Middleſex*. And though this penalty be inflicted by an act of the court of common council, which is no court of record, yet it is a court ſo vaſtly different from courts baron, or ſuch other petit courts, that in 4. *Inſt.* 245. my *Lord Coke* does not ſtick to * compare it to the court of parliament, where the mayor and aldermen repreſent the upper houſe, and the commonalty the houſe of commons. And what immediately concerns the good government of *London*, does very nearly concern the whole kingdom; of which *vide* 8. *Co.* 187. * [671]

The king, as fountain of juſtice, has the nomination of ſheriffs all over the kingdom; and ſince he, by his patent, has delegated that power for *London* and *Middleſex* to the city of *London*, as incident thereto, they muſt not only chuſe ſheriffs, but may alſo compel them to ſerve; for otherwiſe here would be a failure of juſtice; and the conſequence of that in theſe two counties would be of extreme danger to the whole kingdom. The office is of very great concern, for he has the cuſtody of the county: beſides, it concerns the public revenue, part whereof he collects; and it is given for a reaſon in *Slade's Caſe* (*a*), that a wager of law lies not in *quo minus*, becauſe the king's revenue is remotely concerned, upon ſuggeſtion, that the plaintiff is indebted to the king, and leſs able to pay him by the defendant's detainer of his debt; *ergo à pari* in an action concerning the acceptance of an office relating to the king's revenue, he ought not to be received to his wager of law. Beſides, here is a contempt in the defendant, which he ought not to be allowed to ſwear off. Alſo all the matters that charge him are facts notoriouſly known, in which there never are any precedents of wagers of law. Again, when the matter of the charge is pregnant with matter of law, there ought to be no wager of law, for that were to ſwear to the law; as in debt againſt huſband for clothes taken up by the wife, the huſband ſhall not wage his law, becauſe it is a point of law, whether he be liable or no, *viz.* whether the clothes were for neceſſary apparel of the wife, without which he is not liable. Then the very cuſtom of *London* excludes wager of law in ſome actions, as in debt for diet; 1. *Edw.* 4. 6.; *Bro. Examination*, 18.; the ſtatute of 38. *Edw.* 3. c. 5. before which no wager of law could be againſt a *Londoner*; *Br. Ley Gager*, 94. Another reaſon againſt the waging law here is, that by cuſtom of *London* the common council may make by-laws for the better City may compel ſerving of ſheriff.

(*a*) 4 Co. 92.

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HATSELL, *one of* [illegible] confirmed by MAGNA [illegible]liament. So that this being first, divided th[illegible] a nature to be avoided by a

FIRST, W[illegible]

SECOND[illegible] 261.

THIRD[illegible] is, that this action is brought by the now ame[illegible] *London*, in a court holden before the to be r[illegible] the record says, that the mayor and

Fo[illegible] came before that court, that is, the mayor *scili*[illegible] before the mayor and aldermen; so that the cit[illegible] and party, a thing against natural justice.

Wager of law will not lie.

[illegible] be error; for though the mayor be not sole plaintiff, yet he is essentially plaintiff and judge; and the case of the bailiff of *Norwich*, in 2. *Ro. Ab.* 93. differs from this. One brings an action before the bailiff and steward of the town, and pending the action the bailiff dies, and the plaintiff is made bailiff, and then judgment is given for him; that judgment is not erroneous, because it is given by the court, and not by him alone; for there the action is originally well brought, and the plaintiff was not bailiff at the time of the action brought. But besides, I do not take the opinion there to be the resolution of the court; *vide* 3. *Cro.* 320. that it is not error, except it be objected to and over-ruled; but surely that is a hard doctrine; for it might so happen, that he had not an opportunity of pleading it below: but my reason for that judgment is, that it did not appear on the record to be the same person. But here it does appear on the record to be the same person; and that being so, though the action were originally well commenced, yet I take it to be error. If one of the aldermen of *London* should bring an action before the mayor and aldermen, and recover, that may be a good judgment, because it may be a court of mayor and aldermen without him, and the plaintiff would not be an essential part of the court; *vide* 13. *Hen.* 8. 12. 14. *Hen.* 8. 2. Master and confrery of an hospital may present one of the brothers to a benefice, but they cannot present the master, or infeoff the master: for to that purpose the brother who is presented or infeoffed is severed from the body; and though the master have a double capacity, *viz* a natural and a political one, yet in one capacity he cannot do an act to himself in the other capacity; but any single brother may take from the head and the remainder of the brothers, because the head and the rest of the brothers are a perfect corporation without him; *vide* 3. *Hen.* 6. 43. but the brothers are not a corporation without the master, who is the head. And he quoted *Hob.* 87. that an act of parliament against natural equity, as to make one a judge in his own cause, would be merely void.

*[673]

Master and brethren of an hospital may present a brother to a benefice, but cannot present the master.

4. Co. 13.

Diminution not to be alledged in an inferior court.

* As to the last point, he held it a plain discontinuance, and not amendable, for diminution is not to be alledged in such an inferior court as this of the mayor is; that judgment ought to be reverted, for the two last reasons.

WARD,

WARD, *Chief Baron.* The errors aſſigned are three:

FIRST, That the act of common council mentioned is contrary to the law of *England* and right reaſon.

SECONDLY, That the defendant ought to have been admitted to wage his law.

THIRDLY, The general error, *viz.* that judgment is given for the plaintiff, when it ought to be given for the defendant.

And all theſe three fall under five conſiderations:

FIRST, Whether the act of common council be good to maintain this action?

SECONDLY, If it be, Whether it be brought in the right court?

THIRDLY, Whether wager of law lies?

FOURTHLY, If that does not lie, Whether judgment ought to be final and peremptory, or only a *reſpondeas ouſter?*

FIFTHLY, If all theſe points be againſt the plaintiff in error, Whether there appear ſuch error on the record for which the judgment ought to be reverſed?

AS TO THE FIRST, The act of common council is a good ground for this action, both in reaſon and in the legal conſideration of it; and that has been ſo adjudged both in the courts of common pleas and king's bench. The ſubject-matter of this by-law is the power the city of *London* has for chooſing ſheriffs for *London* and *Middleſex*, which franchiſe is by royal charter granted to *London*, whereby a truſt is repoſed in the city that ſheriffs be accordingly choſen; and a failure therein would be ſuch a breach of truſt as would be a good cauſe of forfeiture of their franchiſe. And as this office is of great truſt, ſo likewiſe is it an office of charge, which makes people unwilling to take it upon themſelves; ſo that there is an abſolute neceſſity there ſhould be a compulſive power in the city to enforce ſome to exerciſe it, for the preſervation of their franchiſe and diſcharge of their truſt. And this by-law is in purſuance of this compulſive power, and made by the mayor and common council, and by conſequence by all the freemen, whoſe conſent is involved in that of the common council; and they that are intruſted to make laws for the better governing of the city are the beſt judges of the qualifications of perſons fit to bear this office, and of the penalty they ſhall incur in caſe of refuſal. And every corporation in *England* has a power to make a by-law for the better ordering and government of the corporation, as incident to their being: and he quoted the caſe of *Vanacre*, * in the king's bench, and a judgment upon the return of a *hab. corp.* in this very caſe in the common pleas. * [574] Ante, 269. Salk. 142.

SECOND POINT, Whether the action be well brought in the mayor's court? The penalty by the by-law is limited to the mayor,

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commonalty, and citizens of *London*, and therefore none can ſue for it but the mayor, commonalty, and citizens; then it is limited and reſtrained to be ſued in any of the king's courts of record in *London*, and there are two conſiderable courts of record in *London*, *viz.* the ſheriff's court and the mayor's court; and in either of theſe courts, if the parties had been proper, this action might have been brought; and without doubt it might have been brought in the ſheriff's court.

In the face of the record it does appear, that this action is brought by the mayor and commonalty; ſo it appears here is a complete body, and every corporation aggregate muſt ſue by the name of the head and body, and the head is eſſentially neceſſary. Here the mayor is the head, and the corporation the commonalty or citizens of *London*. Then who are they that are the conſtituent parties of the court? And we find they are the mayor and aldermen; ſo we find the ſame men ſue before the ſame men, that is, the mayor and commonalty ſue before the mayor and aldermen, *viz.* the mayor ſues before himſelf; and that is it which makes the inconſiſtency, which is ſo much the greater, that it is without neceſſity, for they might bring this action in the ſheriff's court.

And this objection does not ariſe from point of intereſt, but from point of inconſiſtency, for an objection from the point of intereſt would be of no force; for the mayor has no greater ſhare of the penalty to be recovered than even the party defendant has.

OBJECTION. Though the ſtile of the court be before the mayor and aldermen, yet they never are there, but all is done before the recorder, who may or may not be free of the city. It is like a grant of conuſance of pleas to a man, though he himſelf be party, which is bad if there be not a judge appointed; but if another be appointed a judge, the grant is good, for the king's patents cannot enable one to be judge and party.

ANSWER. This were to take an averment againſt the record, whereby it appears that the court is held before the mayor and aldermen.

OBJECTION. The ſame thing was uſed to be in the king's bench, when the king ſat there upon pleas of the crown, as they ſtill may do; therefore this is no material objection.

ANSWER. By the conſtitution of *England*, though the king ſat in that * court, yet the judgment was given by the Judges, and not by the king, 4. *Inſt.* 71. 73.; and all judgments are to be PER CUR. And if a criminal be to be puniſhed by fine at the king's will, it ſhall be done by the Judges according to the law of *England*, and not by the king himſelf; and that is, becauſe that ſuch is the king's will; and he quoted the caſe of 14. *Hen.* 8. 2. *Bro. Corporat.* 34. before mentioned by HATSELL. If the corporation of *London* give a letter of attorney to make livery, and before

* [675]

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it is made the mayor dies, and after livery is made before another mayor choſen, it is ill. *Bro. Corporat.* 63, 64. But if the mayor had been made, and then a livery, it had been well, becauſe at the time of the livery there had been a complete corporation to all purpoſes; and an obligation made by the commonalty to the mayor is not good. *Bro. ib.* 4. *Inſt.* 213. 12. *Co.* 114. *Ro. Judgm.* 93. that the chamberlain of *Cheſter* cannot determine a cauſe in which he himſelf is party; and here the mayor of *London* is the chief plaintiff and the chief judge. THE CITY OF LONDON *againſt* WOOD

The death of the mayor cauſes a ceſſation of juriſdiction of the corporation till another mayor be choſe. *Vide Dyer*, 220. where a recognizance entered into before *Sir N. B.* keeper of the great ſeal, acknowledging ſuch a ſum due to him and to two more; and held void as to *N. B.* but good as to the reſt; and a Judge cannot take a conuſance of a fine to himſelf. *Ro. Judgment*, 93, 94. *Hob.* 85. *Mo.* 871. 2. *Ro. Ab.* 279, 280. 2. *Ro. Ab. title Trial. Styl.* 107. 130. And though many precedents be of ſuch actions, yet they paſſed *ſub ſilentio*, and therefore cannot maintain ſuch an incongruity as here is. And the caſe of the bailiff of *Newcaſtle*, *Ro.* 89. which is moſt like this, yet it differs from it in this, that there it does not appear on record that the ſame perſon was judge, as here it does.

THIRDLY, As to the wager of law, it lies not here; though, generally ſpeaking, where the debt is not grounded upon any ſpecialty, or matter ſavouring of the realty, it will lie. And he quoted the caſe in 1. *Vent.* 261. in point, and 2. *Lev.* 106. the ſame caſe; but it lies in debt upon aſſignment of commiſſioners of bankrupt. 2. *Cro. Bradſhaw's Caſe*, becauſe the act of the commiſſion out of chancery, nor the deed of aſſignment, do not alter the nature of the original debt, but only transfer it as it is; and therefore if the debtor could have waged his law againſt the bankrupt, he ſhall ſtill do it againſt the aſſignee. If a debt ariſes upon a by-law authorized by letters patent, wager of law will not lie in debt for it. And the office of ſheriffs of * *London* and *Middleſex* is granted to the city by the charter of *King John*; and a power of making by-laws to enforce the exerciſe of that office is neceſſarily and incidently granted by the ſame letters patent; ſo this by-law now in queſtion is in ſome reſpect grounded upon letters patent. And my *Lord Coke* ſays, that wager of law is grounded upon the law of God, which ſays, that if one leaves an ox in the cuſtody of another, and the ox dies, or is loſt, that the bailor ſhould take the bailee's oath of ſuch death or loſs to diſcharge him. * [676]

And *per* WARD, There is ſuch a multifariouſneſs of facts in the foundation of this action, that it were very unſafe for a man to wage his law in it, and very inconvenient to admit him to; and Judges are to uſe a ſort of diſcretion in admitting people to wage law, *vide* 5. *Hen.* 4.

FOURTHLY,

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FOURTHLY, The judgment ought to be final, for it is an action of debt; and the plea is *nihil debet*, which is in bar, though the concluſion be impertinent.

FIFTHLY, It is a plain diſcontinuance, and no way to ſet it right; *ergo jud. reverſetur.*

HOLT, *Chief Juſtice.* There are ſeveral points in this caſe. And as to the firſt matter in it, which is the goodneſs of the by-law, I have given my opinion as to that point already in the king's bench, in the caſe of *the City of London v. Vanacre* (*a*), and it had then the concurrence of all my Brothers; and ſince the ſame point came in queſtion in this very caſe in the common pleas upon a *hab. corp.* and that Court did likewiſe concur with us in the king's bench; ſo I wonder it ſhould not be left quiet now, it being ſo firmly eſtabliſhed, that it cannot be otherwiſe ſhaken but by the lords in parliament.

Where one wages law, inſtead of concluding to the country, judgment final ſhall be.

Then as to the point, Whether judgment final ought to be, or an anſwer over? ſurely it muſt be a judgment final, for ſince he pleads a *nil debet*, and inſtead of concluding to the country he concludes to wage his law; if he ought not to be admitted to that, without doubt he ought to have final judgment; and there is no colour for a *reſpondeas ouſter*, for there never is a judgment to anſwer over but where there is a dilatory plea pleaded, or to the juriſdiction of the court, or to abate the writ.

Judgment of *reſpondeas ouſter* is only where there is a dilatory plea, to the juriſdiction, or in abatement of the writ.

So in this caſe there are three things obſervable:

FIRST, Whether upon an action brought upon this act of common council for a penalty incurred, or ſuppoſed to be incurred upon it, there ought to be a wager of law?

SECONDLY, Whether upon this record, as certified to us, there does appear a * diſcontinuance?

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THIRDLY, Whether, upon certificate that the record below is amended, we may amend the record before us by the record ſet right below?

FOURTHLY, Whether this action be well brought by the mayor, commonalty, and citizens of *London*, in the court of the mayor and aldermen?

As to the defendant's attempt to wage his law, I hold his plea ill concluded, for he ought to conclude to the country, for theſe reaſons: Firſt, Though it be a debt not founded upon a ſpecialty, yet the foundation of the action is the wrong of the defendant; he is guilty of a wrong in refuſing obedience to this act of common council, for he has not done what the act required him to do, that is, take an oath of his inſufficiency, or pay down his fine, or aſſume the office according to the act; ſo that his non-compliance with this law, by which he was bound, is the wrong which is the foun-

(*a*) Ante, 270.

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dation of this action. And whenever a man is charged with a penalty for an injury or wrong done by him, or act of disobedience done by him, he cannot wage his law. And this is the reason of *Slade's Case*, which was an action for money for goods sold and delivered; and this is the right difference, and not that which is made in the actions, *viz.* that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant's wrong, &c. and when not; for if debt be brought, and that the foundation of the action is the wrong of the defendant, wager of law will not lie.

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Whenever a man is charged with a penalty for a wrong done, wager of law lies not.

The statute of *Richard the Second* gives debt against a sheriff for escape of a prisoner in execution; and the words of the statute are, that the plaintiff shall have debt, and recover the whole sum in judgment; yet upon that statute wager of law was never attempted; and the only reason is, because the debt arises from the wrong of the defendant, who by suffering the escape, to the prejudice of the plaintiff, brought this penalty upon himself; and for that reason, it being merely grounded upon the defendant's wrong, if he dies the action dies with him, and will not lie against his executor, *vide Dy.* 322. *pl.* 25. So in debt upon the statute of *Edward the Six h* for subtraction of tithes, wager of law will not lie; and in that case, too, debt will not lie against an executor, because it is a penalty arising from the wrong of the party, which dies with him. So if debt be brought against an executor upon a *devastavit*, no wager of law lies; and why so? Because it is an action brought upon the wrong of the executor in wasting, and for that reason it * is that it is brought in the *debet ac detinet*; and though that action lies not against an executor but after a judgment for the original debt, nor against the sheriff till after judgment and execution, yet it is not the record of the judgment, but the wrong of the executor in wasting in one case, and of the sheriff in suffering the escape in the other, is the foundation of the other.

Where an action arises from the wrong done by the defendant, it dies with him.

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So in this case it is plain he is guilty of a wrong in not obeying the act of common council, for it is a law in *London*; and every by law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any act of parliament, only with this difference, that a by-law is liable to have its validity brought in question, but an act of parliament is not; but when a by-law is once adjudged to be a good and reasonable by-law, it is to all intents as binding to those that it extends to as an act of parliament can be. Secondly, Wager of law does not lie here in respect of the defendant himself, upon two accounts. First, If he were admitted to discharge himself by wager of law of a debt arising thus from his own wrong, it would be a great temptation to corrupt perjury, and the law never leads men into temptation; and I am afraid the penalty of four hundred pounds would be too great a temptation to some people. Secondly, Though generally wager of law be looked upon as a privilege the defendant has, but originally it was not only the privilege of the defendant to discharge himself,

Every by-law is of equal validity as an act of parliament to persons within the jurisdiction.

Originally plaintiff might compel defendant to wager of law.

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ſelf, but one which the plaintiff had when he had no witneſs of his debt, to put the defendant under a neceſſity of giving him his oath to diſcharge him; ſo it was a kind of an equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confeſs the debt, rather than the plaintiff ſhould loſe his debt in caſes where he had no witneſſes of it at all, or had ſome who were then dead. *Magna Charta*, c. 28. makes this very manifeſt; the words are, "*Nullus ballivus de cætero ponat aliquem* "*ad legem manifeſtam, nec ad juramentum ſimplici loquela ſua, ſine* "*teſtibus fidelibus ad hoc inductis*;" where note the words "*de cætero*, which ſhew that before that time the law was, that if a man had brought an action againſt another without any witneſs, he might put the defendant to his oath, whether he owed not the debt, and that was thought hard; and to prevent it this ſtatute was made; but the witneſſes mentioned by the ſtatute are not to be produced after iſſue joined, or to be croſs-examined, but only to give proof of a probable cauſe of action; that is, ſuch proof as we now * require of a *modus decimandi*, when we grant a prohibition to ſtay a ſuit for tithes in *ſpecie*. And upon bringing ſuch convenient proof by credible witneſſes, and averring the ſtatute of *Magna Charta*, a plaintiff may at this day compel a defendant to wage his law. In 33. *H.* 6. 8. in a *præcipe quod reddat*, the tenant made default, but appeared on the return of the great *capias*, and pleaded non-ſummons, and would conclude to the country, where the proper trial was, by wager of law of non ſummons; and the queſtion there was, If he could waive his plea of wager of law, and betake himſelf to plea concluding to the country? and the better opinion there is, that he could not put himſelf upon his country, and decline his wager of law. And that caſe is plainly out of the ſtatute of *Magna Charta*, becauſe it is not debt, nor *ſimplex loquela*, but a proceſs of non-ſummons from which he was to ſave himſelf; therefore ſince this action is grounded upon the defendant's tort, it would be hard to put the defendant to wage his law; for it were too great a temptation to ſave the penalty of four hundred pounds, and the law of *England* does abhor people's ſwearing, when they are charged with a crime or offence. Indeed when the Popiſh clergy did prevail, they did introduce an oath *ex officio* to make people ſwear when they were charged with a crime of eccleſiaſtical conuſance; but that practice was always looked upon as an incroachment upon the right of the people. *Vide* 12. *Co.* 26. and other authorities mentioned there.

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Ante, 196. Plaintiff, on bringing convenient proof, and averring *Magna Charta*, may compel defendant to wage his law.

Another principal reaſon why a wager of law will not lie in this caſe is, becauſe the act of common council, by which this duty is created, is notorious and publick; it is the law of the city of *London*, of which every body within the city muſt take notice; and the ſecrecy of the contract which raiſes the debt, is the reaſon of the wager of law; but if the debt ariſe from a contract that is notorious, there ſhall be no wager of law; and ſo is the reaſon of the diverſity between theſe two caſes, of an action of account brought

Secrecy is the reaſon of waging law, and therefore cannot be in reſpect of a by law, which is notorious.

brought againſt a receiver; for if it be againſt him as receiver by the hands of the plaintiff, a wager of law will lie; but if he be charged for money received by the hands of a third perſon, no wager of law ſhall be allowed; becauſe it appears from the nature of the action that a third perſon can prove the receipt; and the action in our caſe is brought upon the act of common council, and other publick tranſactions, which are publickly known; *ergo à fortiori* wager of law is not receivable. * But if in detinue the bailment be by another hand than the plaintiff's, yet the defendant ſhall wage his law: and the reaſon of the diverſity is, that in a declaration in detinue the bailment is no neceſſary ingredient, and the plaintiff by alledging an unneceſſary thing ſhall not bar the defendant from the benefit of waging his law. For if in detinue the defendant ſhould plead *nihil detinet*, and put himſelf upon the country, and upon the trial it appeared that the defendant found the goods, inſtead of having them by the bailment of a third perſon, yet the plaintiff ſhall recover; ſo the *gît* of the action is not the delivery of the goods, but the detainer is the only material part of the action; and the whole point is, whether he detained the goods; and that is a matter of ſecrecy.

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Wager of law will lie in account by receiver for money received by the plaintiff, but not by a third perſon.

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And he quoted 1. *Inſt.* 295. that wager of law lies in debt upon an award, if the ſubmiſſion be by parol; which was urged to be grounded upon a notorious tranſaction, and by the interpoſition of ſtrangers. But PER LUY, The award is not the ground of the action there, but the ſubmiſſion, which may be in private; for an award without a ſubmiſſion would be void, and therefore the ſubmiſſion is the ground-work, and what raiſes the duty: but the principal caſe here is not like any caſe in our Books, where a wager of law is allowed. As to the *Caſe of the Corporation of Glaziers*, which is relied on as a parallel caſe, admit that caſe to be law, (as I ſhall demonſtrate it is not by and by) it is nothing like this caſe: for the company of glaziers brought an action upon a by-law made by them, to which the defendant pleaded *nihil debet*, and put himſelf upon his law, and ſo had day given him to wage his law; ſo it never came before the Court judicially to determine: but if that were law, there would be a vaſt difference between that caſe and this; for a by-law by a whole city, or other town corporate, is what all people that live or come within ſuch city or town are bound to take notice of, without any more a-do; but a law made by a particular fraternity, or company within a city or town, none but the members of the ſame are bound to take notice of. 1. *Bulſt.* 11. And ſurely a by law by the company of glaziers in *London*, which only binds their own members, and is only for the better government of that private ſociety, is not to be compared to a by-law by the common council of *London*, or by any other corporation of a publick concern. In the eighteenth year of *Charles the Second*, upon the act of common council for reſtraining the number of carts in the city, * and an action brought for the penalty for breach of that law, the great objection was, that the party had not notice of the law, he being

The reaſon why wager of law lies on award, if ſubmiſſion be by parol, is, that the ſubmiſſion is the ground of the action.

Vide Sav. 40

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being no member of the corporation; yet it being a law of the city, it was ruled, that every one that came into the city was bound to take notice of it: and this caſe differs therefore from all the reaſons and authorities quoted concerning wagers of law. Then as to the caſe of amerciament in a court-baron, where it is ſaid, that in debt upon a judgment in ſuch a court, wager of law will lie; which my brother HATSELL allows to be law, and alledges for reaſon of it, that they are matters of ſmall and private concern, but only for a trifling ſum of forty ſhillings, and the amerciament is only for ſmall things, for the benefit of the lord, and not worth giving the country trouble to come to try them. But I muſt own I am not ſatisfied, that a wager of law will lie in that caſe, for two reaſons, one which concerns the plaintiff, and the other the defendant; for the plaintiff, now after the recovery, he has ſufficient proof to make out his cauſe of action; and now it ceaſes to be a matter of ſecrecy, being grounded upon a judicial proceeding of a court at law, and why then ſhould he be put to loſe his debt by a wager of law of the defendant; for now it is not matter of that ſecrecy that requires a wager of law. And the defendant now has a judgment againſt him, ſuppoſe upon the oath of witneſſes; and he might have waged his law in the original ſuit below, and that he omitted to do, but let judgment go by default, or otherwiſe; and ſhall he now by his oath be admitted to falſify that judgment of a court that had juriſdiction? Surely he ſhall not, nor is there any reaſon for it.

Holt doubted whether wager of law would lie on debt on a judgment for amerciament in a court-baron

In many caſes, where there are no deeds or ſpecialty, no wager of law will lie. In account upon receipt by the hands of a third perſon it will not lie; or if it be brought againſt the bailiff of a manor it ſhall not lie; becauſe, ſays the Book, that is in the realty; and what is that to ſay? It is, becauſe it is notorious to the country; becauſe the country takes notice of his looking after the manor, and they have thereby an opportunity of knowing that he has received his rents, &c. So in debt upon a contract for a ſum in groſs, wager of law will lie; but if debt be brought for rent due upon a parol leaſe, it will not lie; and the reaſon is, becauſe it is in the realty, and ariſes from the taking the profits of the land, and occupation of it in the country; and ſo the notoriety of the thing excludes the defendant from waging his law; and it is ridiculous to ſay, * that wager of law will lie in debt upon a judgment in a court-baron, becauſe the money might be paid in private; for that would be a reaſon to wage law in all the caſes before put; but it is to be conſidered that it is not the privacy of the payment, or the poſſibility thereof, that is the occaſion of a wager of law, but that the ground of the action is ſecret; as if debt be brought upon a bond, with condition for the payment of money, the money may be paid privately, and thereby the bond is diſcharged, if payment could be proved; and yet in debt upon ſuch bond wager of law will not lie, becauſe the contract was by ſpecialty; though the bond may be diſcharged by payment, and that the

In account againſt bailiff of a manor, wager of law will not lie.

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the payment might be private; ſo it is plain the poſſibility of private payment will not intitle one to a wager of law. And the reaſon is the ſame here, for the duty ariſes upon a ſolemn act made by the city aſſembled in their legiſlative capacity, and that is very notorious; and what then can intitle him to wage his law, but the poſſibility of payment in private; yet if the foundation of the action be publick and notorious, that ſhall never do it. There was a caſe in the king's bench, 29. *Car.* 2. *Rot.* 92. where it was held, that if debt be brought upon a recovery in a court-baron, the defendant may wage his law. And that is the only caſe of any ſuch judgment or authority that I meet with in the Books; except it be the opinion of 44. *Ed.* 3. 3. which I value very little; the caſe was debt upon account ſtated before auditors, upon which it appeared that money was due to the plaintiff; there it is ſaid, that in caſe money be recovered in a court-baron, and debt be brought upon that judgment, the defendant may wage his law: But who ſays this? Not the Court, but the Counſel at the Bar; and if you conſider all that the Counſel ſaid, you will no more take it to be law than to be goſpel; for they ſay, that for debt upon a recovery in a court-baron, or in a franchiſe, a wager of law would lie; and what is meant by franchiſe is commonly a court of record; for if the king by letters patent grant a franchiſe to hold a court within ſuch a precinct, it will be intended a court of record; for the king cannot grant a franchiſe to hold a court-baron in groſs. And in truth in that caſe the whole Court were under a great miſtake; for it being debt upon account ſtated before auditors, wager of law is therein taken away by the ſtatute of *Weſtminſter the Second*, c. 11. whereby auditors have power to fine and impriſon, *which neceſſarily makes them a court of record*; and therefore no wager * of law can be in debt upon ſuch judgment; and by conſequence no ſtreſs to be laid upon the authority of that book. But 34. *Hen.* 6. 49. *Br. Ley Gager*, 11. is of great authority; if debt be recovered in a court of antient demeſne, and an action be brought upon that recovery, no wager of law will lie againſt it; yet a court of antient demeſne is no more a court of record than a court-baron is; and no difference in this reſpect can be made between the two courts. And therefore if wager of law does not lie in one, as the authority of that caſe is full that it does not, none will lie in the other.

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2 Inſt. 380. Sav. 115. *cont.* Vide Sav. 83. that eccleſiaſtical commiſſioners may fine and impriſon; yet that they are not a court of record. Ante, 388.

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Court of antient demeſne no court of record.

There are two caſes mentioned in *Pincheon's Caſe* (*a*), concerning wagers of law, and the reaſon thereof. FIRST, If one retain a painter, or other workman to ſerve him, who after brings debt for his wages, the maſter ſhall wage his law; but if it be a retainer upo.. the ſtatute of Labourers, he ſhall not wage his law; and the reaſon given by the Book is, becauſe in the caſe of the ſtatute he is compellable to ſerve: but ſurely that can be no reaſon, for though he be bound to ſerve, the other is not bound

(*a*) 9. Co. 88.

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to take him; but the reaſon is, becauſe it is hard the maſter ſhould be put to wage his law, but rather that the plaintiff ſhould be put to prove his retainer by the ſtatute. Another caſe is 28. *H.* 6. 4. *b.* One was a priſoner in the *Tower* for high treaſon, and the lieutenant finds him meat and drink, and for this brings debt, and the defendant was denied his law; and *Co.* in his 9. *Rep. ubi ſupra*, gives for reaſon, that the lieutenant was bound to find his priſoner with meat and drink; but that is not law, for the gaoler is not bound ſo to do; *vide Pl.* 68. *a.* And it is for the benefit of the priſoner that he ſhall not be put upon it, for the other muſt make out his charge, and not put the defendant to his oath. And another reaſon why he ſhall not wage his law is, becauſe, while the priſoner is in his charge, the gaoler cannot take any ſecurity for his victuals from himſelf; for a bond from him in that caſe would be *ipſo facto* void; and *ergo*, ſince he is diſabled from taking a ſecurity from the priſoner, but barely his promiſe, it were hard to allow the priſoner to clear himſelf by his oath. Another reaſon why wager of law ſhould not be allowed here is, that every by-law is grounded upon charter or preſcription; if it be matter of record, it leaves no room for a wager of law; and if it be by preſcription, it is time out of mind, and no man living can ſwear that off, or deny a preſcription upon oath. It is true, a preſcription is capable of proof, by ſhewing a uſage of ſuch a thing by * antient witneſſes, which is an evidence only of a preſcription. 1. *Vent.* 261. Wager of law was denied in debt for ſcavage ariſing by preſcription. And laſtly, a wager of law will not lie here, becauſe this act of common council does not affect the defendant only, but all the whole body of the city; and there is no caſe, where there is a penalty, to which all the men within ſuch a juriſdiction, precinct, or city, are obnoxious, that a wager of law was allowed; and this anſwers all your caſes of recoveries and amerciaments in courts; for there none is affected but one; but this law is made to extend to the whole community of the city for all generations to come, and for aught I know to the day of judgment. Now as to the *Caſe of the Company of Glaziers* before put, it is true, ſo far as it was a debt for the recovery of a penalty inflicted by a by-law, it is like this caſe, and a precedent for it: But how happened that matter? FIRST, It was allowed by Counſel on both ſides, and the Court never heard of it but once upon a motion, and admiſſion of the Counſel of both ſides; ſo it was a gudgeon ſwallowed, and ſo it paſſed without obſervation. And the caſe in *Co. Ent.* 118. is very like this: Debt was brought for a fine ſet upon the defendant by the homage at the court-baron, grounded upon a cuſtom to make laws for regulating their common, and inflicting a penalty on ſuch as did incloſe at inconvenient times; and a wager of law was offered there, and judgment is there for the defendant; for of common right the homage has no right to impoſe a penalty for ſuch private offences, but it is only by cuſtom that they can do it; *vide* 5. *Co. Chamberlain of London's Caſe. Mo* 270. 1. *Leon.* 203.

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The caſe indeed is not well reported, but upon comparing both the Books together, it appears the wager of law was not admitted in that caſe.

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THE SECOND POINT conſiderable is, Whether here be a diſcontinuance? And ſurely it is, for it appears that the defendant came into court, and appeared to a plaint levied againſt him the 15th of *November*, and his bail was given to appear at the next court, which was held the day following, *viz.* the ſixteenth, but there is no day given to him on record, or to the plaintiff, to appear on the ſixteenth; but preſently after bail taken, there is day given to the 20th of *June*, and every caſe ought to be continued from court to court, as in *Weſtminſter Hall* from Term to Term, if it be not a real action, where long proceſs is allowed. *Vide* 21. *Hen.* 7. 16. Diſcontinuance is error by the common law; but by the 32. *Hen.* 8. c. —. it would be cured, if it * were after verdict; but this is upon demurrer. So the next thing conſiderable is, Whether this be amendable? And ſurely it is not; for it is ſuch a miſpriſion as is not amendable by 14. *Ed.* 3. *c.* 6. or 8. *H.* 6. *c.* 12. for theſe ſtatutes do not extend to amend any record but in errors, which are the miſpriſion of clerks in making their entries on record; but a diſcontinuance is a fault of the Court, and that never was amended by any of theſe ſtatutes; and many judgments have been reverſed for it, as in 2. *Cro.* 211. If a Court once give a judgment they cannot after amend, 3. *Cro.* 412. *Ireland's Caſe*, *Yel.* 169. 2. *Cro.* 260. 3. *Cro* 619. And if a diſcontinuance were amendable by any of theſe ſtatutes, there had been no need of the ſtatute of 32. *Hen.* 8. —. that ſupplies the want of continuance after verdict. But if the record below be well, why may not we amend by that? And though the court below be not of as high a nature as the courts of *Weſtminſter-Hall*, the grand ſeſſions of *Wales*, or the county palatine, yet if the record below had been originally well, and this fault had been only a ſlip in the clerk in tranſcribing, we ought to amend it, by the ſtatute of 8. *Hen.* 6. for the record being well below, the omiſſion was in the clerk; and though the very record be that which we have here, yet if it had appeared to us to have been well below, we ought to have amended by it. In the king's bench, in error of a judgment of an inferior court upon the record certified it appeared there were but eleven jurors, which was the fatal error; but the book of the inferior court, where the names of the jurors were entered, was produced, and oath being made that the twelve there entered were ſworn of the jury, the record was amended by that book; but here we find that the record was originally bad below, and amended below as ſoon as the exception was taken here. And in every day's practice, if the record entered on the roll be ill, yet if the paper-book in the office be well, we give them leave to amend by the book in the office; but if the paper-book be originally ill, and clandeſtinely amended, there we never let them amend their record by it.

If caſe in city-courts be not continued, it is a diſcontinuance, and not amendable.

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Objection. You will give credit to our record, as if it were in *Weſtminſter-Hall*, if the roll be amended by the court of common pleas or king's bench, when error is in the chequer chamber. *Anſwer.* Thoſe courts will amend nothing but what is amendable by law, at leaſt it muſt be preſumed they will not do it; beſides, when in thoſe courts they amend the matter below, they come into the king's * bench and alledge diminution, and thereupon the record is certified up, and then the Court above can never tell whether they have amended or not; if they certify it up upon diminution alledged, it will do well enough, and we ſhall not ſuppoſe they have done amiſs. But no *certiorari* lies to this court of the mayor, and that is the caſe of *Green v. Cole* in 2. *Saund.* 252. 1. *Lev.* 310.

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No *certiorari* lies to the mayor's court.

THE THIRD GREAT POINT is the manner of bringing of this action, to which there were two exceptions taken: the firſt is to the by-law, that it inflicts a penalty for the benefit of thoſe that make the law. But that point has been already ſettled, and the by-law notwithſtanding adjudged good; and the truth is, that objection has not weight enough to require an elaborate anſwer; for we muſt conſider the city of *London*, as all other great towns are to be conſidered, a great community that have a legiſlative power intruſted to them for their better government, and can make laws to bind the property of thoſe that live within that city or precinct, and alſo of all ſtrangers whatſoever that come within the limits of their juriſdiction; and it was neceſſary and convenient they ſhould have ſuch power for the ſupport of their government; and it is ſo in all countries and forms of government whatever, whether monarchy, ariſtocracy, or democracy, or whatever order of government it be; for the ſupreme juriſdiction cannot have leiſure to inſpect into the ſmall matters that concern the whole order and regulation of matters within that ſociety or community, as they that are members of it ſhall. *Vide Beaulieu de Rep. c.* 2. *Hob.* 221. ſays that all corporations, as ſuch, have power to make laws and ordinances, and need not ſpecial words in their patents to enable them thereunto. And if they have power to make laws, of neceſſary conſequence they muſt have a power to inflict a penalty for the inforcing of that law; and here in *England* it muſt be a pecuniary one, for a corporal one it cannot be by the law of *England*, it being againſt *Magna Charta*, without a ſpecial cuſtom. And this pecuniary penalty muſt be levied by diſtreſs, or action of debt; for there can be no other remedy. And ſurely it can be no exception, that this penalty goes to the uſe of the body politick, for it is moſt reaſonable it ſhould be ſo; for it is in the nature of damage for an injury done, and that injury is done to the body politick, whoſe laws are broke and deſpiſed, and therefore it is fit they ſhould have the penalty; and to ſay that one who is free of the corporation ſhould not be judge, becauſe * he is to have ſhare of the penalty, is as ridiculous as groundleſs: and ſince this objection has had ſo little regard with us in the king's

Bodia. Allcorporations, as ſuch, have power to make by-laws.

Penalty of by-laws may go to the corporation.

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king's bench, I wonder it ſhould be ſo much inſiſted on now, eſpecially ſince it has been alſo rejected in the common pleas. I agree, where the city of *London* claims any freedom or franchiſe to itſelf, there none of *London* ſhall be judge or jury, for there they claim an intereſt to themſelves againſt the reſt of mankind; but here is only an act of government to exerciſe a power which they have by law. And it is not to be imagined that the aldermen of the city, in kindneſs to the body politick, would oppreſs the reſt; and the freemen, who ſhould try the fact, would be themſelves obnoxious to the like penalty in time, and in their turns; and if there were any room for a preſumption, it would be that they would favour private perſons againſt the body politick, in regard of their own private intereſts, which would be concerned next time.

Where corporation claims a franchiſe, ſhall not be judge or jury in diſpute about it.

But THE TRUE GREAT POINT is, that the court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to ſue, is the very perſon before whom the action is brought; and this cannot be by the rules of any law whatever, for it is againſt all laws that the ſame perſon ſhould be party and judge in the ſame cauſe, for it is manifeſt contradiction; for the party is he that is to complain to the judge, and the judge is to hear the party; the party endeavours to have his will, the judge determines againſt the will of the party, and has authority to enforce him to obey his ſentence: and can any man act againſt his own will, or enforce himſelf to obey? The judge is agent, the party is patient, and the ſame perſon cannot be both agent and patient in the ſame thing; but it is the ſame thing to ſay that the ſame man may be patient and agent in the ſame thing, as to ſay that he may be judge and party; and it is manifeſt contradiction. And what my Lord *Coke* ſays in Dr. *Bonham's Caſe* in his 8. *Co.* is far from any extravagancy, for it is a very reaſonable and true ſaying, That if an act of parliament ſhould ordain that the ſame perſon ſhould be party and judge, or, which is the ſame thing, judge in his own cauſe, it would be a void act of parliament; for it is impoſſible that one ſhould be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do * ſeveral things that look pretty odd; for it may diſcharge one from his allegiance to the government he lives under, and reſtore him to the ſtate of nature; but it cannot make one that lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for *A.* to lie with the wife of *B.* but it may make the wife of *A.* to be the wife of *B.* and diſſolve her marriage with *A.*

Litt. §. 212. 1. Inſt. 141. Hob. 87. Perſon cannot be both party and judge.

Vide 3. Inſt. 38. Steward, Comptroller, &c. of king's houſhold, ſhall try one for conſpiring his own death.

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Objection. My Lord Mayor, as he is head of the corporation, acts in his politick capacity, and judges in his natural capacity.

THE CITY OF LONDON *againſt* WOOD.

It is true he acts in different capacities, yet the perſon is the ſame, and the difference of the capacities in which he acts, does not make a difference; as the Biſhop of *London* has two capacities, one as Biſhop, the other as *I. S.* but he cannot do an act in one capacity to inure to him in another capacity; as he cannot make a leaſe for years as he is biſhop, to himſelf as he is *I. S.* nor *vice verſa.*

Objection. It is an inviſible body politick. It is true, but the head is viſible as the biſhop is, and he is the moſt conſpicuous part of the corporation, and that without which there would not be a corporation exiſting; and it is impoſſible to get over the two judgments in *Henry* the Eighth's time, before cited by my Brothers: The maſter and confrery of the hoſpital had the preſentation to a rectory; they under their common ſeal preſent their maſter, without taking notice that he was their maſter, and it was held to be a void preſentation, and that judgment was after affirmed upon writ of error; and in that caſe the difference is taken between preſenting one of the members, and preſenting the maſter; for if they had preſented one of the members, it had been well; for if that member were ſet aſide, yet ſtill it would be a corporation. And when they preſent a member, it is a ſetting aſide, or an excluſion of him for that purpoſe from the corporation; but if the maſter, who is the head, be ſet aſide, then it ceaſes to be a corporation, and by conſequence cannot do any corporate act, and then their preſentation is void; ſo if this court could be before the aldermen without the mayor, then this action might be well brought; but as, if the Chief Juſtice of common pleas bring an action in the common pleas, as it is his privilege to do, yet there he muſt not be named in the whole proceedings but as plaintiff, and not ſo much as the *placita* ſhall be ſaid to be before him, for then it would be error; and the *placita* ſhall be *coram Ed. Nevill, Joanne Powel, & Joanne Blincowe*; and if he take out the writ, it muſt be not* ſo much as teſted in his own name, but in the name of the next ſenior Judge: ſo here, ſince the court cannot be held without a mayor, this action which is brought in his name cannot be brought in that court, and the lord mayor is a neceſſary conſtituent part of the city; *vide* 21. *Edw.* 4. 15. 151. 17. *Edw.* 3. 48. A burgeſs of a corporation had laid out money for the uſe of the corporation, and after being mayor, took the bond of the corporation for it to him in his natural capacity, and held void. And he allowed the caſe in 2. *Ro. Ab.* —. before cited, to be good law, but utterly exploded the reaſon given there: the caſe was, A member of a corporation brings an action in the mayor's court, and after the plaintiff was choſen mayor, and then judgment for him, and a writ of error brought, and the judgment affirmed; becauſe, ſays the book, the judgment was not given by him alone, but by the court; but if he be in the ſtile of the court, he is a judge of the court, and it cannot be a court without him. And though my LORD ROLL

* [689]

was

was a very learned man, and that his Abridgment was publiſhed by my LORD HALE, perhaps the greateſt man of the law that ever was, yet this reaſon might be overlooked by him; however, it is plain this reaſon is a ſenſeleſs one, but the true reaſon is to be ſeen in 2. *Hen.* 4. 40. If *A.* ſue in the court of mayor and bailiffs, *A.* is made mayor, and it is not ſaid in the record that he was made mayor, or it do not appear in the record that he was made mayor, there if the defendant do not come to the court below, and plead this error in fact, he ſhall never after aſſign it for error; but if he had pleaded this error in fact, and had been overruled in it, he might have a writ of error; for one ſhall never take advantage of an error in fact, where he had an opportunity of pleading it; that is, if it be ſuch an error in fact as does abate the writ; and if it be ſuch an error in fact as does happen after the time of pleading is out, then the way is to bring an *audita querela*; as if after verdict between the day of *niſi prius* the plaintiff releaſe to the defendant, he cannot plead it in bank, but muſt have recourſe to an *auditâ querela*; and if this exception had been taken upon the *habeas corpus* in *Weſtminſter-Hall*, it would not have hindered a *procedendo*, becauſe it was an error in the proceedings. And the *habeas corpus* is only to know the cauſe of detainer of the party in cuſtody, and what is then to be judged of is only the return of the by-law; and if that * be good, we muſt remand, for to enter into an examination of the proceedings would be to preclude the plaintiff before his time.

THE CITY OF LONDON *againſt* WOOD.

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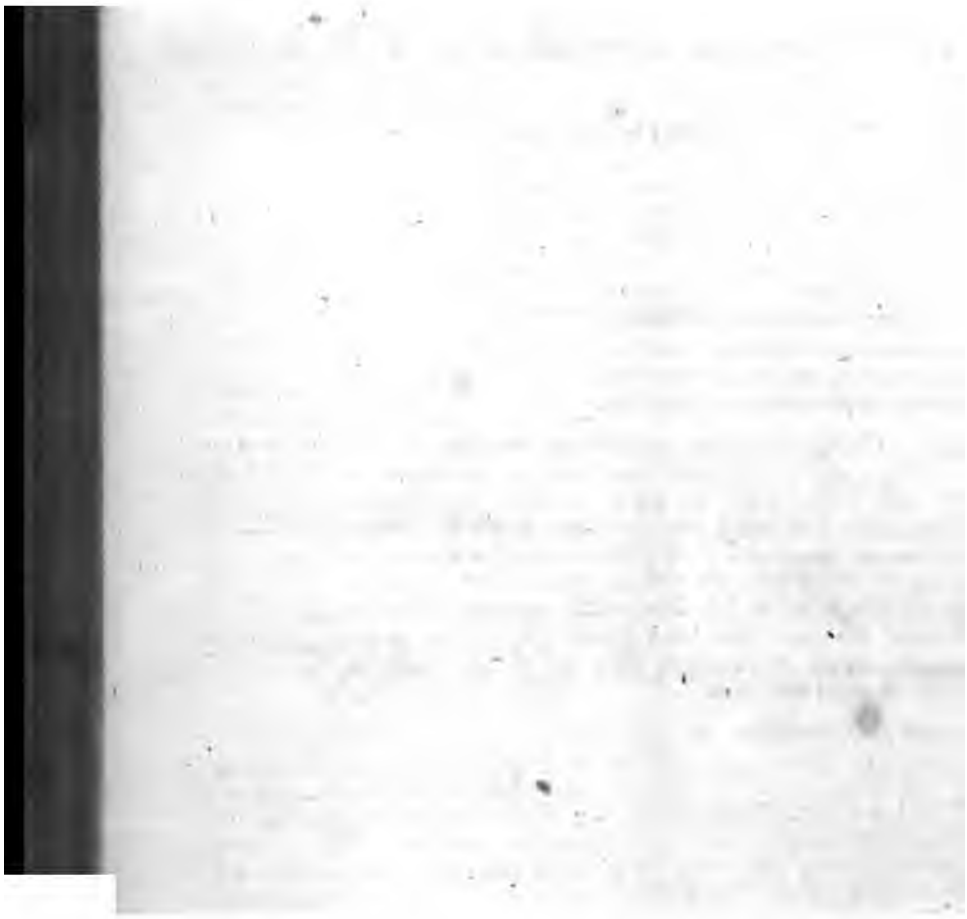
Objection. Though the mayor be named in the plea, yet the recorder is judge, and that we muſt take notice of as judges by commiſſion here in the city; where we are as much bound to take notice of the cuſtoms of the city and its courts, as we ſhould take of the cuſtoms of the courts of *Weſtminſter-Hall* when we ſit there. *Anſwer.* The *placita* are virtually held before the mayor and aldermen, though in fact the recorder acts, and is as a deputy; and the ſteward of a court who has a deputy cannot ſue in the court before his deputy; and a deputy acts, and of right ought to act, in the name of his principal.

The court is held before the mayor and aldermen, though the recorder acts as deputy.

Et per omnes jud. reverſetur.



A

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11. Judgment amended according to the warrant of attorney to conſeſs it, *Grabborn v. Railer*, 402

12. In amendment of a declaration plaintiff has election to pay coſts, or grant an imparlance, *Weſt v. Weſt*, 442

13. Cannot amend after iſſue joined and entered, *Anonymous*, 598

AMERCIAMENTS.

See FINES.

ANTIENT DEMESNE.

1. Antient demeſne manor is impleadable at common law; lands held of the manor in the lord's court only, *Parker v. Winch*, 13

2. Antient demeſne court is no court of record, 683

APPEAL.

See CLERGY.

1. In appeal the plaintiff muſt appear in perſon, and not by attorney. If he does not appear at a day on which he is demandable, he may be demanded and nonſuited, *Loowder v. Screwdens*, 20, 21

2. Appeal, though it cannot be altered by common law, or any ſtatute, yet before it be filed it may be altered according to the truth, *Loowder v. Screwdens*, 21

3. It was ſaid, that where a man is found guilty by grand jury or inqueſt, he is ouſted of battail on appeal, *ibid.*

4. The record not being put in on appeal, to be tried at *niſi prius*; neither nonſuit nor diſcontinuance, only appellant to pay coſts. Appearance of appellant's attorney ſufficient, being in caſe of a feme, *Sutton v. Sparrow*, 65

5. Appeal was lodged againſt a perſon convicted of manſlaughter, but not proſecuted; he was bailed before clergy had, *Armſtrong v. Liſle*, 109

6. A perſon found guilty of manſlaughter may be appealed the ſame ſeſſions; but if not ready the appeal will be gone, *Liſle v. Armſtrong*, 157

7. Neither an acquittal, nor an attainder, is a bar to appeal at common law, but the having clergy; which, if delayed by default of the Court, ſhall not hurt him, *Liſle v. Armſtrong*, 158

8. The day the writ is returnable, if it be returned, the appellant may be demanded; and he does not come, the appellee will be diſcharged, *Stout v. Marſon*, 349

9. Infant ſued out a writ of appeal, the ſheriff delivered it up to the infant, who cancelled it; this is a contempt in the ſheriff, *Stout v. Towler*, 372, 373

10. Infant need not have guardian to ſue the writ, but to proſecute it, *Stout v. Towler*, 374, 375

11. The year being expired, and the writ deſtroyed, cannot have a new writ of courſe; and it is diſcretionary in the chancellor to grant one, *Stout v. Towler*, 375

12. If appellant be nonſuit, yet the king may proceed, 374

13. On appeal againſt a perſon in the ſheriff's cuſtody, he muſt not only return *cepi corpus*, but *parat' habere*, 416, 417

14. If writ be ill for want of fifteen days between *teſte* and return, by appearance and pleading in chief that benefit is loſt, *Wilmot v. Tyler*, 451, 452

15. Appeal ſhould be returned *non eſt inventus* before *capias*, *Anonymous*, 554

16. If the indictment, on which the conviction was, be vitious, or the plea ill pleaded, defendant muſt plead to iſſue, *Colt v. Smith*, 642

17. Benefit of clergy, and burning in the hand, is no judgment, *ibid.*

APPEARANCE

1. Does not help a diſcontinuance, but it does a miſcontinuance, *Anonymous*, 8

2. Firſt proceſs in inferior court was a *capias*; it is but a miſconveyance of proceſs, and helped by appearance, *Colthurſt v. Wiſeman*, 47

3. Filing a writ of *habeas corpus* is no appearance, but *procedendo* may go notwithſtanding, *Anonymous*, 215

4. There is no difference between a voluntary appearance and on a *cepi corpus*, *Anonymous*, 404

5. Appearance in a civil action is to the end of the ſuit, to an indictment only of the Term, *Rex v. Foſter*, 448

6. Conviction for uſing a trade one month, on indictment for uſing it three months, may be pleaded in bar, *abſque hoc* that he was guilty in any other month, *Anonymous*, 561

APPRENTICES.

See ORDER OF JUSTICES OF PEACE.

1. The maſter of an apprentice in huſbandry dies, the juſtices at the ſeſſions order

order his executors to keep him, and quaſhed; ſaid, perhaps covenant would lie againſt the executors, *Pratt's Caſe*, 27

2. Apprentice ſhould be diſcharged under the hands and ſeals of four juſtices; but on *certiorari* to remove an order, the diſcharge need not be certified, *Anonymous*, 83

3. *Mandamus* to admit a perſon to his freedom, having ſerved ſeven years apprenticeſhip, *Morrice v. Mayor of Lincoln*, 190

4. Order of ſeſſions diſcharging apprentice from his maſter, good, though no complaint firſt made to two juſtices, *Rex v. Hays*, 349

5. Trover will lie by maſter for a ticket or writing intitling an apprentice to money earned by him; but if never was in his cuſtody, *aſſumpſit*, *Anonymous*, 415

6. Apprentice cannot be aſſigned without his conſent, *Anonymous*, 441

7. Apprentice is not aſſignable in law, but if ſerves his time under the aſſignment in another town, he gains ſettlement there, *Rex v. Aickles*, 553

ARBITRAMENT.

1. Submiſſion of both parties is a mutual promiſe, whereon *indebitatus aſſumpſit* will lie; and award without performance is a good bar, *Crofts v. Harris*, 4

2. Award for a general releaſe to the time of the award; a releaſe to the time of the ſubmiſſion is good, *Anonymous*, 8

3. Award of all matters to the time of the award, good; for ſhall be intended no new matter aroſe between the time of the ſubmiſſion and the award; and if it ſhould award for matters ſince the ſubmiſſion, it would as to them be void; and a releaſe of all matters to the time of ſubmiſſion, would be a good performance of ſuch award, *Hooper v. Peirce*, 116, 117

4. Award by umpire before the arbitrator's time is expired, is void, *Reynolds v. Gray*, 120

5. If arbitrators chooſe umpire conditionally that he accept it, if he refuſe, may chooſe again; *aliter* if no condition be annexed, for have executed their authority, *ibid.*

6. A man may undertake as attorney, that *B.* ſhall ſubmit to award, *Bacon v. De Barry*, 129

7. Award pleaded to be made *de præmiſſis* muſt really appear to be ſo, elſe ill, *ibid.*

8. Award of mutual releaſes only, not good, *Freeman v. Bernard*, 130

9. If a ſum of money, or other thing, is awarded in ſatisfaction, it diſcharges the old duty, and raiſes a new one, for which action will lie, *ibid.*

10. In all caſes award ſhould be final, and not referring to any future examination, except in relation to payment of coſts, which may be to be ſuch as the proper officer ſhall tax, *Selby v. Ruſſell*, 139

11. Award made by rule of Court of money to be paid on one ſide, and nothing done on the other; Court will not grant attachment till releaſe be tendered, *Palmer's Caſe*, 234

12. Before attachment goes on non-performance of award, muſt be perſonal notice, and demand of the money; or of endeavour to find and ſerve him, *Anonymous*, 257

13. Before attachment for non-performance of award, ſhould be affidavit of award demanded, *Chandler v. Driver*, 317

14. Award of mutual releaſes not good; for nothing awarded which will bear action, *Anonymous*, 423

15. Submiſſion to award of *A.* and *B.* provided they make award by a certain time; and if cannot agree, to umpirage of ſuch as they ſhould chooſe; umpire ſo choſen may make award within the time; for by chooſing an umpire have determined their authority, *Mitchell v. Harris*, 512

16. But if the umpire was expreſsly named in the ſubmiſſion, his umpirage within the time would be void, 513

17. On

17. On motion to make ſubmiſſion of award, rule of Court ſhould be notice, *Anonymous*, 525

18. If only part of an award be ſet forth, and concluſion be with a *profert*, if defendant craves *oyer*, and demurrer, it is ill for the variance, *Furlong v. Thornigold*, 533

19. Award may be good in part, and void in part, *Furlong v. Thornigold*, 534

20. A void part of an award need not be ſet forth, *ibid.*

21. Award to do a thing which is out of a perſon's power, is void, *Lee v. Elkins*, 585

22. Award of diſtinct things may be good in part, and void in part, *ibid.*

23. If award exceeds time of ſubmiſſion, nothing ſhall be ſuppoſed to have intervened, *ibid.*

24. If the day of performance appears on the record, performance may be averred, or breach aſſigned, by referring to it with a *præd'*. *Lee v. Elkins*, 586

25. Though award be void in part, if it be mutual for another part, it will be good for that, *Lee v. Elkins*, 587

26. Where a particular thing is to be done on one ſide, as a condition for doing ſeveral others on the other, if any are ill awarded, it is ill *in toto*, 587

27. Where a void thing is awarded as a condition precedent, the doing of it muſt be averred, 588

28. Where ſeveral things are awarded, on performance *præmiſſ.* the other is to releaſe, averment of performance of what is well awarded is ſufficient, *ibid.*

29. Releaſe to the time of ſubmiſſion, good performance of award of releaſe to the time of award, 589

30. *Sed per* TREVOR: That is only when general releaſe is awarded, not where it is expreſsly ſaid to be to the time of the award, *ibid.*

31. PER TREVOR: If it appears that a void part of award was intended as a conſideration of doing a thing on the other ſide, it muſt be averred, *Lee v. Elkins*, 590, 591

32. Debt on award, defendant ſets forth a void award, verdict for plaintiff; judgment arreſted, *Anonymous*, 635

ARREST OF JUDGMENT.

If on a declaration where part is good, and part ill, a writ of enquiry be executed for the whole, or entire damages given, judgment may be ſtayed, *Anonymous*, 5

ASSAULT.

See TRESPASS.

ASSEMBLIES UNLAWFUL.

See RIOTS.

ASSETS.

See OCCUPANT.

1. Executor takes bond from debtor of teſtator, this is aſſets, *Anonymous*, 346

2. Executor not giving in an inventory, is preſumption of aſſets, *Anonymous*, 346

3. If wife continues ſuit begun by her and her huſband for a debt due to her, when recovered it ſhall not be aſſets, *ibid.*

4. Bond given in truſt is not aſſets, *Nichol v. Bridebridge*, 381

5. In pleading want of aſſets the time muſt be ſet forth, *Ingram v. Foot*, 611

ASSIGNMENT.

Leſſee aſſigns the term to a perſon, who aſſigns it over to *A.* without notice to the leſſor; leſſor cannot have covenant againſt his leſſee for arrears of rent due after the aſſignment to *A. Pitcher v. Tovey*,

ASSUMPSIT.

See ACTIONS ON THE CASE AND BREACH.

ATTACHMENT.

1. An attachment in chancery on an *alias et pluries* is returnable in *B. R.* and is not merely for the contempt, but an action on which ſhall recover damages for the delay in executing the writ. It is a contempt not to return the firſt *mandamus*, *Anonymous*, 164

2. There are two ſorts of attachments on a mandatory writ; the one intitles the party to damages, and that muſt be on the *pluries*; and the other puniſhes the contempt, which may be on the *alias*, *Anonymous*, 348

3. On *reſcous* returned, attachment ſhall go without motion, *Anonymous*, 247

4. Muſt be perſonal notice before Court will grant attachment for not performing an award, *Anonymous*, 257

5. If interrogatories be not exhibited in a week, the recognizance entered into is diſcharged of courſe, *Holland's Caſe*, 310

6. And the party has four juridical days to anſwer them, whenever filed; and, if they are not anſwered in that time, he is committed on motion, *ibid.*

7. Motion for attachment on affidavit that he kept out of the way, and could not be ſerved with peremptory *mandamus*, 312

8. Before attachment on award, ſhould be affidavit that award was demanded, *Rex v. Tooley*, 317

9. A miſdemeanor in an officer of an inferior court is a contempt of *B. R. Starkey's caſe cited*, 374

10. Sheriff delivered up a writ of appeal to the appellant, an infant, held a contempt, and fined for it, *Stout v. Towler*, 374, 375

11. If coſts taxed by a maſter are not paid, attachment goes, *Anonymous*, 493

12. If interrogatories are impertinent or improper, may be demurred to, *Rex v. Raw*, 499

13. *Certiorari* muſt be delivered before can be in contempt, *ibid.*

14. If one brought in, in contempt, denies upon oath, he is diſcharged; but if he be forſworn, he may be proſecuted for perjury, *Rex v. Sims*, 512

ATTORNEY AND SOLICITOR.

See PRIVILEGE.

1. If attorney on motion has his name ſtruck out of roll, he ſhall not after be admitted to act as one, *Anonymous*, 247

2. Attorney having promiſed to accept a declaration, obliged to do it, *Kilbey v. Weyberg*, 251

3. Attorney of *B. R.* ſued for fees in the ſheriff's court, obliged to refer them to a maſter, for he is under the power of the Court, *Beal's Caſe*, 251, 252

4. Attorney executor not intitled to privilege, *Newton v. Rowland*, 316

5. Attorney on record cannot be changed, without leave of the Court, and when he is ſo changed the record ought to mention it was done by leave of the Court, *Anonymous*, 440

6. After judgment the attorney on record may receive and acknowledge ſatisfaction, *ibid.*

7. Attorney may be ordered to deliver up papers to the owner, *Anonymous*, 516

8. But not without agreement to pay his reaſonable demands, *Anonymous*, 554

9. A perſon, who could get no attorney to appear for him, had one appointed by the Court, *Trevanion's caſe*, 583

10. Action againſt attorney for money received; the attorney moved to have his own bill taxed, and allowance of what was due: Court will not interpoſe, *Craddock v. Glen*, 657

11. Attorney, who gives another leave to practiſe in his name, is anſwerable for what he does in his name, *Anonymous*, 666

AUDITA QUERELA.

1. *Audita querela* is not a *ſuperſedeas*, and execution ſhall not be ſtayed without a ſpecial *ſuperſedeas*; and that ſhall not be

be granted till the matter of the *audita querela* be proved by two witneſſes, *Anonymous*, 105

2. When one is relieved on *audita querela*, he is reſtored to whatſoever he loſt by the firſt judgment, *Anonymous*, 598

3. If has releaſe which he had not opportunity of proving, and bring reaſonable proof of it, Court will relieve on motion, and ſuperſede execution. *ibid.*

AVERMENT.

See TRESPASS.

1. In treſpaſs, aſſault and battery, if defendant vary as to the time, muſt aver *quæ eſt eadem tranſgreſſio*; but where he agrees in the time, need not, *Rex v. Hebbard*, 48

2. Where foreign coin is demanded, it is always in the *detinet*, with averment that defendant has neither rendered it or the value, *St. Ledger v. Pope*, 81

3. Averring lands are deficient, puts the proof on the pleader, *Berty v. Dormer*, 526

AVOWRY.

See REPLEVIN.

AUTHORITY.

See COPYHOLD.

1. If a perſon who is a deputy ſteward appoint a perſon to take a ſurrender, it is good, *Anonymous*, 525

2. See alſo *Thorp v. Thorp*, 466

3. Deputy has all the power of the principal, and if abridged by proviſo, the proviſo is void, *Parker v. Ket*, 467

4. Deputy ſheriff muſt do acts in the name of the high ſheriff, becauſe the writs are directed to him, *Parker v. Ket*, 468

5. Deputy ſteward of a manor may do it in his own name, *ibid.*

6. Where a perſon, having a power, does an act without reciting his power, which would not be good, but under the power, it ſhall be taken to be done by the power, *Parker v. Ket*, 469

7. A ſteward *de facto* having an appearance of authority does acts, his acts are good, *Parker v. Ket*, 470

8. So lord *de facto* may receive ſurrenders, and make admittances, and are good; but to make voluntary grants muſt have a right, *Parker v. Ket*, 472

9. Authority may be given by parol to endorſe his name on a bill of exchange, *Anonymous*, 564

AWARD.

See ARBITRAMENT.

B.

BAIL-BOND.

See SHERIFF.

BAIL IN CIVIL CASES.

1. Two actions were againſt the ſame perſon, and the ſame perſons bail in both; a *reddidit ſe* in one action is a diſcharge of bail in the other, *Williams v. Batter*, 99

2. *Scire facias* againſt bail, who come in and plead payment before the return of the ſecond *ſcire facias*, ill; for the recognizance is broke before the iſſuing the firſt *ſcire facias*, *Coniers v. Manucaptors of Rawlins*, 112

3. Where there is ſurrender in diſcharge of bail before forfeiture of recognizance, need not give notice; *aliter* where it is forfeited, and a *capias* gone, and *non eſt invent.* returned, *Anonymous*, 236

4. Bail is not excepted againſt in *London*, but a proper officer takes it; which if inſufficient, he will be liable to have the profits of his office ſequeſtered till the debt be paid.—When a cauſe is removed out of *London* into *B. R.* the bail and clerk below are diſcharged, *Adams v. Coxe*, 249

5. In action againſt maſter of a ſhip for embezzling goods, ſhall be ſpecial bail; but on negligent keeping, common bail, *Anonymous*, 251

6. On ſpecial *aſſumpſit* for money won at play, ſhall be ſpecial bail, *Carrill v. Cockran*, 295

7. Whether additional bail be of the Term in which it was put in, or of the Term in which the original bail was put in. *Quær. Corps v. Kitchen Hall*, 318

8. Bail in error cannot diſcharge himſelf by ſurrender of the principal, *Shoot v. Higgs*, 319

9. Common bail being regularly filed, ſhall not after make oath of the debt being above ten pounds, *Anonymous*, 324

10. In debt againſt bail, principal may be ſurrendered, as in caſe of *ſcire facias* and two *nihils* returned, *Watt's Caſe*, 351

11. After exception to bail muſt be juſtified, or cannot proceed to trial, *Anonymous*, 385

12. Special bail ſometimes granted in *ſcandalum magnatum*, *The Duke of Schomberg v. Murray*, 420

13. If priſoner renders himſelf in diſcharge of bail in a Judge's chamber, the entry ſigned of it by the Judge is the record of it, and ſhould be filed in the office, *Clapham v. Wray*, 423

14. On exception taken to bail, notice ſhould be to the defendant's attorney, *Anonymous*, 435

15. Plaintiff may refuſe aſſignment of bail taken by the ſheriff, and proceed againſt him by amercements, 447

16. Bail to the action may plead uſurious contract, *Anonymous*, 493

17. Heir ſued as ſuch, not to be held to ſpecial bail no more than executor, *Anonymous*, 511

18. Bail can never ſurrender, or party ſurrender himſelf in diſcharge of bail, but on return of proceſs, or when in court by bail, *Anonymous*, 525

19. On common bail filed, if declaration be not delivered before the end of two Terms, ſhall be nonſuit, *Taylor v. Brudon*, 526

20. If good cauſe of action be not made out before a Judge, common bail ſhall be ordered; and if plaintiff do not give notice that he will move the Court, the order is final, *ibid.*

21. Several cauſes of action cannot be joined to enforce ſpecial bail, *Anonymous*, 527

22. To reverſe outlawry for error in law, ſpecial bail need not be to the original action, as it muſt for want of proclamations, *Wilbraham v. Doley*, 545

23. Special bail to reverſe the outlawry, is to anſwer the condemnation; other ſpecial bail is, or to render the body to priſon, *Wilbraham v. Doley*, 545, 546

24. Render of principal in diſcharge of bail is not a *committitur* till entered, *Anonymous*, 559

25. After *capias* returned againſt the principal, plaintiff may proceed againſt bail notwithſtanding a writ of error, *Dundee v. Petty*, 567

26. On a *reddidit ſe* of the principal before a Judge, the bail is diſcharged, but the marſhal is not liable for eſcape till notice of *committitur*, *Watſon v. Sutton*, 583

27. Principal died before return of the ſecond *ſcire facias* againſt bail, yet cannot diſcharge them. Death of the party before return of the *capias*, a good plea to the *ſcire facias*, *Anonymous*, 601, 602

28. Proceedings on bail-bond cannot be ſtayed till other bail put in, *Anonymous*, 614

29. If ſpecial bail be required in inferior court, and the cauſe be removed, ſpecial bail ſhall be put in above, elſe *procedendo* ſhall go, *Croſs v. Smith*, 646

30. Bail to have eight days in full Term after return of proceſs againſt the principal to render him, *Smith v. Oxtring*, 650

BAIL IN CRIMINAL CASES.

1. A perſon indicted above two Terms for treaſon, is afreſh indicted for the ſame ſpecies of treaſon differently laid; Court inclined might be bailed, but gave no opinion, but did it by virtue of their diſcretionary power, *Croſby's Caſe*, 66

2. So alſo *Rex v. Lord Ayleſbury*, 117

3. Bail not allowed in manſlaughter till clergy, *Rex v. Keat*, 102

4. See alſo *Armſtrong v. Liſle*, 108

5. Appeal was lodged againſt a man convicted of manſlaughter, but not proſecuted; he was bailed before clergy had, *Armſtrong v. Liſle*, 109

6. A perſon indicted for murder ſeldom bailed without very extraordinary reaſons, though it be in the power of the Court, *Rex v. Kirk*, 309

7. One of ill fame not bailable by *Weſtminſter the Second*, *Anonymous*, 431

8. Perſon charged with buggery not bailable, *Anonymous*, 435

BAILIFF.

If one be found bailiff generally, he ſhall account for all in the declaration, *Heliard's Caſe*, 420

BANKRUPTS.

1. A term was aſſigned by the commiſſioners to a creditor, who before inrollment of the aſſignment made a leaſe, and then inrolled the aſſignment; ſuch leſſee cannot maintain ejectment, for till the inrollment it is no ſale by the commiſſioners, *Elliot v. Danby*, 3

2. Commiſſion of bankruptcy may be taken out againſt a perſon who had left off trade for a fact committed while in trade, *Meggot v. Mills and Waine*, 159

3. Infant cannot be a bankrupt; for though the debts of an infant are only voidable at his election, yet no one can be a bankrupt for debts he is not obliged to pay, *Rex v. Cole*, 243

4. Chancery may refuſe to grant a commiſſion without petition; but if do, ſhall not vitiate, *Turner v. Maine*, 306, 307

5. *Indebitatus aſſumpſit* by the aſſignee of commiſſioners of bankruptcy for goods ſold after bankruptcy committed, lies, or may bring trover, but not both, *Huſſey v. Fiddall*, 324

6. By bankruptcy the property is in the creditors, and aſſignee is to have the ſame remedy as bankrupt would have had, *ibid.*

7. General *indebitatus* lies, *ibid.*

8. If one of the joint traders is bankrupt, his proportion is only aſſignable, *Anonymous*, 446

9. If a creditor obtain judgment, ſubſequent to act of bankruptcy, on commiſſion taken out the judgment is avoided, *ibid.*

BARONS.

See PEERS.

BARON AND FEME.

1. There is no difference in the caſe of baron and feme, and any other two perſons, where one of them is found guilty in treſpaſs, *Hare v. White*, 19

2. Huſband may releaſe coſts decreed to the wife in the ſpiritual court, if there be no divorce; for if there be, ſhe is intitled to alimony, and out of that the coſts are ſuppoſed to proceed, which cannot therefore releaſe; but a legacy he may, as belonging to him, *Chamberlain v. Hewitſon*, 89

3. Promiſe made to a man for payment of a debt due to his wife as executrix; action for this promiſe muſt be brought by the baron alone, *Yard v. Ellard*, 207

4. If a wife part from her huſband by agreement, and he make her allowance after ſuch ſeparation, if it be notorious, he is not chargeable for neceſſaries, *Todd v. Stokes*, 244, 245

5. Perſonal knowledge of ſuch agreement is not neceſſary, if notorious, *Todd v. Stokes*, 245

6. But if the debt be contracted within ſo ſhort a time, as the ſeparation could not be ſuppoſed notorious, he ſhall, *Todd v. Stokes*, 245

7. If ſhe go away without conſent, ſhe muſt find her own credit, without charge to the huſband, *ibid.*

8. And general notice not to truſt her is ſufficient, *ibid.*

9. Treſpaſs againſt baron and feme, baron dies, yet well, for wife may commit treſpaſs along with her huſband, 246, 247

10. In perſonal actions *ne unque accouple* in matrimony no plea, as it is in real actions, *Mitchell v. Garrett*, 276

11. Marriage is a releaſe of all bonds which may become due during the coverture, *Cage v. Acton*, 290

12. If executrix marry the debtor, it is no releaſe, for that would be a *devaſtavit*, *ibid.*

13. Any thing that by poſſibility may accrue to the wife during coverture, huſband may releaſe; but what cannot, he cannot releaſe, *Cage v. Acton*, 294

14. Covenant or promiſe by a ſtranger to leave the wife ſo much, if ſhe ſurvived, huſband cannot releaſe, *ibid.*

15. Bond made to a woman before her marriage, to leave her worth ſo much if ſhe ſurvived, is not extinguiſhed by the marriage, *ibid.*

16. If wife continue a ſuit begun by her and her huſband, for debt due to her, when recovered it ſhall not be aſſets, *Anonymous*, 346

17. Huſband may bring an action alone for money promiſed him as his wife's portion; but if not recovered during coverture, the wife ſhall have it to her own uſe, *ibid.*

18. Cohabiting with a woman, and owning her as his wife, good evidence to charge the man, *Carr v. King*, 372

19. Feme gave letter of attorney to confeſs judgment, and marries; HOLT inclined it ſhould be entered in the woman's name as ſole, *Reignolds v. Davis*, 383

20. Whether fines and recoveries by *feme-covert* under age may be vacated, purchaſers being concerned, *Sarah Griffiths's Caſe*, 444

21. The old way was to bring error, but as the huſband would not join, doing it by motion was introduced, *ibid.*

22. If *feme-covert* be outlawed, the feme may now be diſcharged on motion, *Sarah Griffiths's Caſe*, 444, 445

23. If coverture be pleaded in abatement, needs no *venue*, only the huſband's name ſhould be ſhewn; but if in bar, muſt be laid at a certain time and place, *Vezey v. Smith*, 503

24. Diſcourſe of *a feme* given in evidence for the defendant, on action brought by baron for debt due to the wife as a ſeparate dealer, *Anonymous*, 566

25. Separate trader cannot be ſued for a debt contracted by her in the way of trade, if her huſband be living, *Anonymous*, 603

26. Feme may plead *non eſt factum*, and give coverture in evidence, *Anonymous*, 609

BARRETRY.

See USURY.

BASTARD.

See BARON *and* FEME. PROHIBITION.

BILL OF EXCEPTIONS.

See TRIAL.

BILLS OF EXCHANGE, MERCHANTS NOTES, &c.

1. Bill of Exchange payable to *A.* or bearer, not aſſignable, *Hodges v. Steward*, 36

2. But if indorſed, is a good bill between indorſor and indorſee, for in nature of a new bill, *ibid.*

3. Though a bill be drawn by a perſon who is no merchant, yet the drawing the bill makes him a trader within the cuſtom of merchants, *Hodges v. Steward*, 36, 37

4. General

4. General *indebitatus aſſumpſit* will not lie on a bill of exchange, but a ſpecial action on the caſe and cuſtom of merchants, or an *indebitatus* for money received to his uſe, *Hodges v. Steward*, 37

5. Bill of exchange, though in writing, is no more than a ſimple contract, *Yeoman v. Bradſhaw*, 107

6. Name indorſed on a bill of exchange may be uſed as an aſſignment, or for a diſcharge when paid; and by the indorſement only the property is not aſſigned, *Clerk v. Pigot*, 192, 193

7. *A.* the day of payment of a bill of exchange being paſſed, promiſed to pay *ſecundum tenorem, &c.* good, and ſhall be paid preſently, *Jackſon v. Pigot*, 211, 212

8. Part of a bill of exchange cannot be aſſigned ſo as to intitle the indorſee to an action, *Hawkins v. Gardner*, 213

9. Bill of exchange payable to *A.* or bearer is paid as money without indorſement; if the principal fails, ſhall not reſort to *A. aliter* if indorſed, *Bank of England v. Newman*, 241

10. Payment of a bill of exchange muſt be demanded of the drawer before indorſee liable, *Lambert v. Oakes*, 244

11. Indorſement creates a contract between indorſor and indorſee, in caſe drawer do not pay, *Lambert v. Oakes*, 244

12. If indorſee do not demand the money of the drawer in a convenient time, the indorſor is not liable, *ibid.*

13. On action brought againſt the indorſor, not neceſſary to prove the hand of the drawer, for though forged the indorſor is liable, *ibid.*

14. Proteſt of a foreign bill of exchange makes the drawer liable, of which he ſhould have notice in convenient time. Inland bills require no proteſt, *Hart v. King*, 309, 310

15. *Indebitatus aſſumpſit* by indorſor againſt the drawer of a bill of exchange, *Anonymous*, 345

16. Nor other proof of a proteſt requiſite but atteſtation of notary public, *ibid.*

17. Bill of exchange may be accepted by parol, 345

18. A ſervant has power to draw bills of exchange in his maſter's name, draws them ſo ſoon after he is diſcharged out of his place that the world could not take notice of it, ſhall bind the maſter, *Harriſon's Caſe*, 346

19. Note to pay the bearer not bill of exchange, only evidence of money lent; and declaring on the cuſtom of merchants will not make it a bill of exchange, *Carter v. Palmer*, 380

20. Bill on goldſmith given at the time of buying goods, good evidence that it was taken in payment; *aliter* if given after. And if the party on whom drawn becomes inſolvent, in action againſt the buyer, on the bill, he ſhall be barred, but may recover againſt him on the original contract, *Anonymous*, 408

21. Acceptance of a bill of exchange is an actual promiſe to pay; and acceptance after the bill is payable binds the acceptor or indorſor, though perhaps not the drawer, *Mitford v. Walcot*, 410

22. Bill of exchange taken in payment for goods is good payment, unleſs vendee knew it was a bad one, *Anonymous*, 517

23. A goldſmith's note does not diſcharge the debt till the money be paid, if there be no default that it was not received, or if diſcharge of the debt be not given at the time, *Ward v. Evans*, 521

24. Authority may be given by parol to indorſe his name on a bill of exchange, *Anonymous*, 564

BONDS.

See OBLIGATIONS.

BISHOPS AND ARCHBISHOPS.

Archbiſhop may cite a ſuffragan to appear before him any where in his province, *Biſhop of St. David's v. Lucy*, 237

BREACH IN COVENANT, DEBT, CASE, &c.

1. Covenant to pay one hundred pounds upon aſſignment of ſtock; and that he would accept the ſame on notice on or before a certain day; in covenant, *P.* alledges notice that he would be ready at the time to make tranſfer, but that *D.* did not come to accept, and non-payment of money aſſigned for breach, it is ill, for tender of a tranſfer ſhould have been aſſigned for breach, *Shales v. Seignioret*, 248, 249

2. Covenant to grind all his corn which he ſhould uſe in his houſe at plaintiff's mill; breach aſſigned that there were five hundred barrels of wheat ground and uſed in defendant's houſe, which he did not grind at plaintiff's mill; ill, it not being ſaid it was his corn, *Hamley v. Hendon*, 327

BRIDGES.

See HIGHWAYS.

BYE-LAWS.

See CORPORATION and LONDON.

1. Cuſtom to make bye-laws to oblige a perſon to take an office under a penalty good, *City of London v. Vanacre*, 269

2. Of common right every corporation may make a bye-law concerning a franchiſe granted to them, *City of London v. Vanacre*, 270

3. Corporation has a power to make bye-laws for the better government of the place, *ibid.*

4. If charter oblige them to appoint an officer, have a power to compel the acceptance of it, *City of London v. Vanacre*, 271

5. General cuſtoms may extend to new things which are within the reaſon of thoſe cuſtoms, *ibid.*

6. Though by ſtatute might be liable to be indicted for refuſing the office, may alſo incur the penalty of the bye-law, *ibid.*

7. As in making bye-law and election all are virtually preſent, a perſon will incur the penalty without notice, *City of London v. Vanacre*, 272, 273

8. If what comes after the *ſcilicet* be repugnant, it ſhall be rejected, *Jonſon v. Meers*, 579, 580

9. Debt will not lie for mayor and commonalty on breach of a bye-law in the mayor's court, as being parties, *City of London v. Wood*, 669, 670

10. All corporations as ſuch, without particular power given them, may make bye-laws, *City of London v. Wood*, 686

11. Penalty for breach of a bye-law may go to the corporation, and be conſidered as damages, *City of London v. Wood*, 686, 687

C.

CANON LAW.

See LAWS.

CAPIAS UTLAGATUM.

See OUTLAWRY.

CARRIER.

1. Action lies againſt a common carrier for refuſing to carry money, unleſs aſſigns a particular reaſon, *Anonymous*, 3

2. Carrier chargeable before law gave him remedy againſt the hundred, *Lane v. Cotton*, 482, 483

3. If a carrier refuſe to carry goods, not being loaden, action lies, *Lane v. Cotton*, 484

CERTIORARI, RECORDARI.

1. *Certiorari* to remove an indictment out of *Weſtmorland*, for uſing a trade, not being apprentice, *Rex v. Haggard*, 188

2. *Certiorari* lies at the deſire of the party, if the Court ſees fit, *Rex v. James*, 197

3. A *certiorari* lies to the grand ſeſſions of *Wales*, *Rex v. James*, 197

4. Indictment in *London* for printing a libel, in which the recorder was aſperſed, was removed by *certiorari*; which being into a foreign county muſt be fifteen days between the *teſte* and return, *Rex v. Dutton*, 250

5. *Certiorari* goes if the record certified out of the common pleas be faulty, *Anonymous*, 317

6. After *certiorari* goes, all proceedings are void after the *teſte*, but perſons not in contempt till ſervice, *Anonymous*, 384

7. Error will not lie to a new-created juriſdiction, which proceeds by methods different from common law; but *certiorari* lies to ſee they have not exceeded their juriſdiction, *Grenville v. College of Phyſicians*, 399

8. Where a particular juriſdiction is erected by act of parliament, the king's bench may command execution of it by *mandamus*, and remove their proceedings by *certiorari*, *Rex v. Inhabitants of Glamorganſhire*, 403

9. Two being indicted, one of them removed it by *certiorari*, the record is removed *quoad* both, *Rex v. Worſenholme*, 601

10. The *certiorari* is always indorſed at whoſe requeſt it is granted, *ibid.*

11. *Certiorari* to the court of *Ely*, *Croſſe v. Smith*, 643

12. Cauſes are removed out of baſe courts by *recordare* or *pone*, out of courts of record by *certiorari*, *Croſſe v. Smith*, 645

13. It is better to remove the cauſe by *habeas corpus*, *Croſſe v. Smith*, 646

14. If ſpecial bail be required below, it ſhall be ſo above, elſe *procedendo* goes, *ibid.*

15. *Certiorari* lies not to mayor's court, *City of London v. Wood*, 686

CHALLENGE.

1. Challenge of the array, for that the jury ſhould have come from a different county, is no good cauſe of challenge, *Rex v. Warden of the Fleet*, 337

2. Want of proper *venue* no cauſe of challenge of the array; but being akin, intereſted, or not qualified, is, *Rex v. Warden of the Fleet*, 338

CHANCERY.

1. Chancery cannot relieve in conditions precedent, for cannot put a value on them; but in caſe of conditions ſubſequent will, *Berty v. Lord Falkland*, 182, 183

2. Portion deviſed out of lands payable at a future day, if the perſon to whom payable dies before the day, it is ſunk for the benefit of the heir; but if it had been charged on a term for years, it ſhall go to the executors, *Yates v. Fettyplace*, 276

3. Before bill of review granted, the decree ſhould be executed, *Anonymous*, 343

4. If a man covenant to purchaſe lands to ſuch uſes, and money be lodged in truſtees hands, though covenantor dies, the Court will compel a purchaſe to be made to the uſes, *Anonymous*, 521, 522

5. But if the firſt eſtate be to be a tail, with remainder over, will not compel a purchaſe for the ſake of the remainder, as tenant in tail might deſtroy it as ſoon as created, *Anonymous*, 522

6. If one covenant to purchaſe for him and the heirs of his body, remainder to his own right heirs, and he dies without iſſue, his executor ſhall not be obliged to purchaſe for the benefit of the heir, *Anonymous*, *ibid.*

7. In bill brought by legatee againſt executor for diſcovery of aſſets, the other legatees need not be parties, *ibid.*

8. If one, under pretence of being inſolvent when he is not ſo, get an abatement of debt, it will be conſidered as a fraud in equity, *Monger v. Kett*, 558

9. If one owe money by mortgage, and alſo by bond, ſhall redeem, without regard to bond. *Quære*, *Monger v. Kett*, 559

10. If money is owed by bond, and alſo by ſimple contract, and payment be generally made, it ſhall be on the bond, as being moſt penal to him, 559

11. Truſtees not anſwerable for each other, *Anonymous*, 560

12. Truſtees not to pay coſts, *ibid.*

13. Truſtees having power to appoint agents not anſwerable for their inſolvency, if ſolvent at time of the appointment; *aliter* if had no ſuch power, *ibid.*

14. If a bill be diſmiſſed with coſts, it is a good plea in bar to another bill for the ſame cauſe, if Counſel's hand be to it, *Anonymous*, 561

15. Will not help defective conveyance, without conſideration, *Anonymous*, 603

16. If a ſum of money is made a collateral ſecurity of a term, the Court will diſcharge it in a reaſonable time, if there be not probable cauſe of fear of eviction, and by whom, unleſs it be expreſsly ordered to continue during the term, *Lord Cornwallis's Caſe*, 614

17. If money is to be raiſed out of lands, and no time mentioned in which it ſhould be done, if the perſon for whoſe uſe it is be ſo young as not to require it immediately, and might be raiſed out of the profits without ſale, the Court will not compel a ſale, *Lord Cornwallis's Caſe*, *ibid.*

18. But if a time is fixed for the raiſing it, it muſt be done, *ibid.*

CHARITABLE AND SUPERSTITIOUS USES.

Superſtitious uſes by 23. *Hen.* 8. void, and given to the king by 1. *Edw.* 6. but that does not extend to future uſes, *Portington's Caſe*, 31

CHURCHES, CHAPELS, CHURCHWARDENS, &c.

1. The accounts of money laid out by churchwardens for the repair of the church, &c. ſhall be allowed in the ſpiritual court; but if there is anything that depends on the agreement of the pariſhioners, the ſucceeding churchwardens may have account, *Styrrop v. Stoakes*, 9

2. A churchwarden choſen by cuſtom cannot be refuſed; and being appointed by the pariſh, that is anſwerable for him, *Rex v. Morgan Rees*, 116

CHURCH OF ENGLAND, AND SEATS IN IT, RELIGION, DISSENTERS, &c.

1. Diſſenters cannot excuſe themſelves from executing offices on account of not having taken the ſacrament, *Rex v. Larwood*, 67

2. By union of churches, at common law they were diſtinct; *aliter* on the ſtatute in reſpect of the fire of *London*, *Herman v. Denns*, 82

3. Parſon to repair the chancel, pariſhioners the church; of right parſon ſhould repair both, but cuſtom of *England* obliges no more than the chancel, *Price v. Rouſe*, 83

4. Diſpoſal of ſeats in the church belongs to the ordinary; and if it has *baptiſterium et ſepulturam*, it is a church, *Lee v. Daniel*, 228

5. Where preſcribe for a ſeat in the church againſt the ordinary, an uſage to repair muſt be ſhewn; but in action on the caſe for diſturbance, poſſeſſion is ſufficient, *Jacob v. Dallow*, 233

6. If a perſon purchaſe a ſeat in a church, his right ceaſes by ceaſing to be a pariſhioner, *Anonymous*, 554

CLERGY.

1. Appeal was lodged againſt a man convicted of manſlaughter, but not proſecuted; he was bailed before clergy had, *Armſtrong v. Liſle*, 109

2. Before 23. *Hen.* 8. clergy was allowed in all caſes except treaſon: if a man had clergy, it was an abſolute diſcharge of all offences before, *Armſtrong v. Liſle*, 110

3. By 25. Edw. 3. c. 5. it is enacted, that all clerks ſhould have their clergy preſently; which, *per* HOLT, muſt be intended the ſame ſeſſions or aſſize, *ibid.*

4. 3. Hen. 7. c. 1. provides, that *autrefoits convict* ſhall be no bar in appeal, unleſs clergy had, 110

5. Before 18. *Eliz.* if a man was indicted of two felonies, and he was indicted of one, and had his clergy before he was arraigned for the other, the other was diſcharged, *Armſtrong v. Liſle*, *ibid.*

6. Clerk ſhall not be burnt in the hand; and if he ſhews his ordination, he need not have the book, for it is preſumed he can read, *Wilmot v. Tyler*, 452

7. Benefit of clergy and burning in the hand is no judgment, *Colt v. Smith*, 642, 643

CLERK OF ASSIZE.

See OFFICES.

COLLATION AND LAPSE.

See ADVOWSON, BISHOPS.

COMMISSION.

See AUTHORITY.

COMMITMENT.

See ATTACHMENT, HABEAS CORPUS.

COMMON.

1. Common laid for ſheep, and found by the jury for cows alſo; held good, being diſtinct commonage, *Burgeſs v. Steer*, 25

2. Where common or way is claimed, the title ought to be ſet forth; *aliter* of a fair or franchiſe, which is no charge, *Anonymous*, 35

COMMON RECOVERY.

See RECOVERY.

COMMON INFORMER.

See INDICTMENT.

COMPUTATION.

See DAY and TERM-TIME.

CONDITION.

1. *A.* agrees to releaſe to *B.* in conſideration of which *B.* agrees to pay; the releaſe is a condition precedent, the performance of which muſt be averred to maintain an action, *Thorpe v. Thorpe*, 455. 462

2. But if a time be appointed for releaſe, which will happen before the time of payment, it is not a condition precedent, but are to be mutual remedies, *Thorpe v. Thorpe*, 461

3. Where the promiſe is executory, it is a condition precedent, *Thorpe v. Thorpe*, 460

4. If one is to do a thing, for which another thing is to be done, it is a condition precedent, *ibid.*

5. *A.* agrees to give *B.* ſo much for the uſe of a coach for a year, and *B.* agrees to keep it in repair, keeping in repair is not a condition precedent, *Atkinſon v. Morrice*, 503

CONQUEST.

See LAW.

CONSIDERATION.

See ASSUMPSIT.

CONSTABLE.

See MARSHAL.

1. A ſteward cannot fine a perſon for not accepting that office, unleſs he refuſe in open court, but muſt be preſented by the next leet, and amerced, and that amerciament affeered, *Fletcher v. Ingram*, 88

2. *Notitiam habuit* of his being elected conſtable is too general; ſhould plead he was ſummoned to accept the office in convenient time, to take oath before the juſtices of peace, *ibid.*

3. Conſtables by common law are to be choſen in the leet, and in default thereof in the ſheriff's tourn; corporation may do it by cuſtom; but that muſt be ſpecially ſhewn, *Rex v. Barnard*, 115

4. Conſtables to be choſen in the leet, or in default thereof in the ſheriff's tourn; and if choſe in the tourn where there is a leet, it is not void, but an encroachment on the leet. By 13. & 14. Car. 2. ſeſſions in particular caſes may appoint conſtable; and HOLT's opinion was, where no conſtable was before cannot appoint one, *Rex v. Hewſon*, 180, 181

5. Cannot impriſon conſtable for refuſal, but indict him, *Rex v. Hewſon*, 180

6. If warrant be directed to a conſtable by name, he may execute it out of his diviſion; but if it be to all headboroughs, conſtables, it muſt be executed reſpectively, *ibid.*

7. Every vill muſt have a conſtable, elſe it is but a hamlet, *ibid.*

8. Order for making a conſtable quaſhed, it not appearing he was an inhabitant of the liberty, *Anonymous*, 256

9. Old conſtable not diſcharged till new one ſworn. *ibid.*

10. On a warrant directed to all conſtables, it is the ſame as if directed to each particular conſtable; and every one is bound to execute it in his particular juriſdiction; but if one conſtable returns he has no diſtreſs in the county at large, it is ill, *Rex v. Chaloner*, 314, 315

11. On ſearch warrant conſtable may ſearch; but if he exceeds his power, he is anſwerable for it, *Anonymous*, 344

12. Conſtable at his peril to take notice that the juſtice of peace continues in the commiſſion, *Normand v. Mills*, 347

13. Conſtable may commit lewd women till find ſureties for good behaviour, *Eliz. Claxton's Caſe*, 566, 567

CONSTRUCTION OF WORDS.

See EXPOSITION.

CONSULTATION.

See PROHIBITION.

CONTEMPT.

See ATTACHMENT.

CONTRACTS.

See BREACH, &c.

CONTINUANCE AND DISCONTINUANCE.

1. Appearance helps a miſcontinuance, but not a diſcontinuance; and it is doubtful whether diſcontinuance in proceſs be helped by the ſtatute of Jeofails, though diſcontinuance in pleading may, *Anonymous*, 8

2. Information is diſcontinued by the death of the defendant before the day in bank after verdict, *The Attorney General v. Buckley*, 228

3. A former action was pleaded in abatement; motion made to diſcontinue the former action, on ſuggeſtion that the attorney was not to be found; but not allowed, *Anonymous*, 230

4. Continuance may be from one day to another in the ſame Term, *Marley v. Blunt*, 307

5. If defendant plead as to part, and ſays nothing to the reſt, it is diſcontinuance, unleſs will take judgment by *nihil dicit*, *Mally's Caſe*, 421

6. Plea pleaded, *puis darrein continuance* is a relinquiſhment of former plea, *Baber v. Palmer*, 539

7. Whether payment of part of a bond, and acquittance for it, *puis darrein continuance* is to be pleaded in bar or abatement; HOLT thought in bar for ſo much, *Baber v. Palmer*, *ibid.*

8. On debt on a bond, receipt of part, *puis darrein continuance* pleaded in bar, good, *Pierce v. Paxton*, 541, 542

9. *Aliter* if on contract, for may be given in evidence, *Pierce v. Paxton*, 542

10. It is not enough to ſay action was continued, but muſt ſhew how, *Hayward v. Kinſey*, 578

11. If continuance be not alledged, it ſhall be intended a diſcontinuance, *ibid.*

12. A declaration of *Michaelmas Term*; in *Hilary Term* defendant pleads payment of part ſince the laſt continuance, to which was demurrer; it is diſcontinuance, *Crow v. Maſon*, 626

13. In

13. In treſpaſs againſt two; and after iſſue joined *puis darrein continuance* one dies; at the trial his default may be recorded, and before judgment his death ſuggeſted, he may have judgment againſt the other, *Anonymous*, 668

14. Caſe in city courts muſt be continued, elſe will be a diſcontinuance, and not amendable, *City of London v. Wood*, 684

CONUSANCE OF PLEAS.

See FRANCHISE.

COPARCENERS.

See JOINTENANTS.

COPYHOLD and COPYHOLDER.

See AUTHORITY.

1. Right to frank bank depends on dying ſeiſed: dower is inchoate by the marriage, *Benſon v. Scott*, 49

2. If tenant for life of a copyhold forfeit, that ſhall not let in the remainderman; but the lord ſhall hold it during the life of tenant for life, *Head v. Tyler*, 123

3. A tenancy eſcheated becomes part of the manor; but if the lord purchaſe part, it is only holden of the manor, *Anonymous*, 138

4. Copyhold lands are parcel of the demeſne lands of the manor, *Winter v. Lovedurr*, 147

5. Copyholds to be governed by the rules of common law, unleſs particular cuſtom intervenes, *Fiſher v. Wiggs*, 301

6. Surrender of a copyhold is a grant, and ſo to be pleaded, *Fiſher v. Wiggs*, 297

7. Copyhold ſurrendered to the uſe of five, equally to be divided, is a tenancy in common, *Fiſher v. Wiggs*, 296

8. Lord cannot cut down timber on copyhold, *Aſhmond v. Ranger*, 378

9. All copyholders of common right have eſtovers, *Aſhmond v. Ranger*, 380

CORONER.

1. Inquiſition taken before a coroner returned to be *nos certe credimus eſſe cauſam mortis*, ill, for ſhould be certain, *Anonymous*, 112

2. Information againſt a coroner for taking off a juryman after he was ſworn, *Rex v. Stukeley*, 493

3. The return of the inquiſition not being filed was quaſhed, and may be ſet aſide for practice; if there be a new inqueſt, it muſt be of thoſe who had view of the body, *ibid.*

4. There cannot be a *melius inquirendum* where the inquiſition is *virtute officii*, *Rex v. Atkinſon*, 496

5. Indictment againſt coroner for practice to find a *felo de ſe non compos*; and Court ſtayed filing the inquiſition till iſſue on the indictment was tried, *Rex v. Atkinſon*, *ibid.*

CORPORATION.

See BYE-LAWS, MANDAMUS.

1. Corporation may be diſſolved, but judgment of ſeizure no proper judgment, for the king cannot have it himſelf, *Rex v. Mayor of London*, 18, 19

2. By a ſurrender of liberties and privileges the corporation is not diſſolved, *Rex v. Mayor of London*, 19

3. If a corporation be made to a particular purpoſe, and they deveſt themſelves of all right, ſo that the end of the inſtitution fails, the corporation is diſſolved, *ibid.*

4. In caſe of an abbot and convent, acts done muſt be by the major part, and the abbot beſides; for the abbot acts only *cum aſſenſu* of the major part; but in caſe of maſter and fellows of a college, the maſter is only part of the acting part, *Anonymous*, 232, 233

5. A new charter granted in conſideration of the ſurrender of an old one, which ſurrender was not enrolled, is void, *Bully v. Palmer*, 247

6. And if there be any perſons in the new one which were not in the old, any laws made by them are void, *ibid.*

7. One made capital burgeſs under the new charter was made mayor under the old one; he ſhall be deemed a legal mayor, being in poſſeſſion of the office, till contrary appear, and ſhould be firſt removed from being capital burgeſs, *Piper v. Dennis*, 253

8. If by charter are obliged to elect at a particular day, nothing will excuſe the not doing it, *Rex v. Borough of Abingdon*, 308

9. Seal of corporation put to a deed by a perſon who is not mayor does not make it the deed of the corporation, *Anonymous*, 423

10. Corporation is not indictable, but the members of it, *Anonymous*, 559

11. By the charter of *Andover*, the mayor and major part of the corporation may turn out whom they pleaſe, and there is no remedy, *Rex v. Andover*, 665

12. Maſter and brethren of an hoſpital may preſent a brother to a benefice, but not the maſter, *City of London v. Wood*, 672

13. Corporation, as ſuch, have power to make bye-laws, without particular power given them, *City of London v. Wood*, 686

14. Mayor cannot ſue in his own court for a penalty of a bye-law, *City of London v. Wood*, 669

COSTS.

1. Officer ſued for levying taxes to have treble coſts, *Willet v. Tiddy*, 6

2. Suit for a penalty of forty ſhillings on a bye-law, being for a ſum certain, ſhall have coſts; *ſed per* HOLT, that is where it is brought by the party grieved; *aliter* where brought by a common informer, *Cutlers Company v. Buſkin*, 46, 47

3. Where judgment is for the defendant on demurrer, in a plea in abatement, ſhall not have coſts, as the plaintiff would not have had them had the judgment been for him, *Toms v. Lloyd*, 195, 196

4. See alſo *Anonymous*, 523. 609

5. If new trial be granted for irregularity, there ſhall be no coſts; *aliter* if on the merits, *Anonymous*, 370

6. No coſts where proceedings ſet aſide for irregularity, *Anonymous*, 435

7. Executor on nonſuit not to pay coſts is on his ſuppoſed ignorance, *Anonymous*, 440

8. If notice of trial be countermanded, muſt pay coſts it has occaſioned, *Anonymous*, 560

COTTAGES AND INMATES.

1. Cottages not to be ſuppreſſed by indictment, *Rex v. Harris*, 406

2. The ſtatute 31. Eliz. c. 7. repealed, *ibid.*

COVENANT.

See ASSIGNMENT *and* BREACH.

1. Covenant will lie for a paſſage excepted in a leaſe, that not being part of the thing demiſed, but *de hors*; *aliter* if it had been part of the thing itſelf demiſed, *Buſh v. Cole*, 24, 25

2. Covenant will lie for arrears of rent due to a perſon in reverſion before his granting the reverſion over, *Midgelays v. Lovelace*, 45, 46

3. Covenant that *A.* his heirs and aſſigns ſhall be paid a rent-charge free from taxes. *Per* three Judges againſt HOLT, It is a covenant which ſhall charge the land, and runs along with it, *Brewſter v. Kidgel*, 166, 167. 171

4. Covenant againſt the adminiſtrator of an aſſignee of a term, on covenant to repair for breach in his own time, *Keeling v. Morrice*, 371

5. Such a covenant runs with the land, and binds the poſſeſſor without the word *aſſigns*, *ibid.*

6. Covenant to build and repair does not bind aſſignee, unleſs named, being for a new thing, *Anonymous*, 384

7. Covenant to convey all his right, no plea to ſay he had none, *Anonymous*, 329

8. Covenant to convey at the charge of covenantee, he muſt tender the charge, and

and covenantor ought to give notice what ſort of conveyance he intends, *Steer v. Shalecroft*, 400, 401

9. But if it be to convey, and covenantee covenants to be at the charge, he muſt convey at his peril, *Steer v. Shalecroft*, 400

10. Covenant to convey before a certain day, he ſhould give notice, *aliter* if on a day certain, *Steer v. Shalecroft*, 401

COUNTIES PALATINE.

See PALATINE COUNTIES.

COURTS AND INFERIOR JURISDICTIONS.

See FRANCHISE.

1. Leet may by preſcription be held at different times than a month after *Eaſter* or *Michaelmas*, and need not ſhew by what authority held, *Rex v. Gilbert*, 4

2. Judgment in inferior court muſt be *per ſeneſchallum hic in curia*, elſe ill, *Fiſher v. Baſton*, 16

3. *Diſtringas* is the execution of a judgment in a court baron, and not a *levari*, unleſs by particular cuſtom, *Shephard v. Taylor*, 124

4. A writ *de executione judicii* is the legal remedy to compel the execution of a judgment in an inferior court, and not a *mandamus*, *Wilkins v. Mitchell*, 196

5. Action brought in inferior court no plea in bar to action brought in ſuperior court for the ſame cauſe, *Brinſby v. Gold*, 204

6. The huſtings is the county court in *London*, *Anonymous*, 320

7. Wherever a court has power either to fine or impriſon, it is a court of record, *Dr. Grenville's Caſe*, 388

8. Where power is given to hear and determine, the matter is not traverſable, *ibid.*

9. On removal of replevin out of inferior court into *B. R.* by *certiorari*, the declaration cannot be altered, *Anonymous*, 453

10. In courts inferior no diminution can be alledged, *Lancaſter v. Lovelace*, 536

11. In ſuit in inferior court, muſt alledge the contract was within the juriſdiction, *Stedman v. Robinſon*, 598

12. May be amerced in a leet for a public, but not for a private nuſance, *ibid.*

13. Appearance in inferior court to be enforced by reaſonable diſtreſs, *Anonymous*, 610

CUSTOMS.

On ſerving apprenticeſhip in the town of *Dartmouth*, he is not thereby entitled to his freedom, *Anonymous*, 336

CUSTOMS OF COPYHOLD MANORS.

See COPYHOLD.

See alſo BYE-LAWS, CORPORATION, LONDON, *and* UNIVERSITIES.

CUSTOS ROTULORUM.

See OFFICES.

D.

DAMAGES.

1. Where jury is not charged with enquiry of damages, may be ſupplied by writ of enquiry, *Herbert v. Walters*, 85

2. Where no attaint lies, an omiſſion may be ſupplied by writ of enquiry, *Herbert v. Walters*, *ibid.*

3. Where entire damages are given, and no damages could be given for part, all ſhall be ſuppoſed given for the reſt, *Weſt v. Cole*, 127

4. Where entire damages are given for what appears to be impoſſible, ill, *Prince v. Molton*, 131

5. Writ of enquiry on trover for wood was ſet aſide, for ſheriff not receiving evidence of the value, *Earl of Kent v. Walters*, 317

6. In actions where there are mutual debts, one cannot be ſet againſt the other in mitigation of damages, *Davila v. Dalmanſer*, 408

7. If writ of enquiry be not executed within a year, muſt be *ſcire facias*, *How v. Acton*, 500

8. On nuſance, conſequential damages may be given in evidence, for there the *gift* of the action is the damage, but not ſo in treſpaſs, for there it is one continued act, *Hampſtead Caſe*, 519

9. In writs of enquiry, the jury ſets their hands and ſeals to verdict, *ibid.*

10. Whether *ſecond deliverance* be a *ſuperſedeas* to writ of enquiry in replevin, *Pratt v. Rutlers*, 546

11. Judge of *niſi prius* only aſſiſtant in writ of enquiry, *Anonymous*, 610

DAY, DATE AND DELIVERY.

See TERM-TIME.

1. Date of a bond is the delivery of it, *Pullen v. Benſon*, 204. 651

2. Promiſe to pay money a twelve-month from the day of the date; it is due that day twelve-month, *Fanſhaw v. Harris*, 256

3. If declares that defendant ſuch a day *conceſſit ſe teneri* by bond, bond ſhall be ſuppoſed to be then delivered, whatever the date be, *Lane v. Green*, 651

DEBTS.

See EXECUTORS.

1. Rent due on an expired parol leaſe, is of equal degree with debt due on a bond, *Godfrey v. Newton*, 7

2. Debt with averment in declaration differs from the condition of a bond, for the plaintiff in the action muſt fully intitle himſelf; but the condition of a bond goes only in defeazance, and muſt come on the part of the defendant, *St. Ledger v. Pope*, 81

3. Debt lies againſt ſheriff for the reward given by act of parliament on conviction of clippers and coiners, *Bignol v. Rogers*, 310

DECLARATION.

1. If a declaration be good in part, and bad in part, it is good for what is well declared; but if writ of enquiry is executed for the whole, or entire damages given, judgment may be ſtaid, *Anonymous*, 5

2. Rent due the twenty-third of *September* declared for as due at *Michaelmas*, ill: Had been good to have declared for rent *aretro* at *Michaelmas*, *Smith v. Bromley*, 5

3. Action, for practiſing phyſic without licenſe, laid at *Weſtminſter* in county of *Middleſex*, not ſaying within ſeven miles of *London*, ill, *College of Phyſicians v. Baſſett*, 10

4. A declaration in treſpaſs wanting *vi et armis*, is ill; for it would alter the judgment from *capiatur* to *miſericordia*, *Anonymous*, 24

5. Declaration for more rent than appears to be due; on releaſe of the overplus may have judgment for the reſidue, *Thwaites v. Aſhfield*, 93

6. If an act of parliament increaſe a penalty, or deprive a man of a benefit he had before at common law, muſt ſhew to be within it, elſe a concluſion *contra formam ſtatuti* is ill; but if there be no act of parliament, it is only ſurpluſage: and where ſome things are within the act, and ſome not, as to thoſe not within it, it is only ſurpluſage, *Bennett v. Talboys*, 122

7. If declaration is not delivered by the laſt day of the ſecond Term, the defendant is not obliged to accept a declaration, but may ſign a *non proſ.* *Barnes v. Geering*, 217

8. If declaration be delivered the day before the laſt day of the Term, the defendant has two days in the following Term to anſwer, *Anonymous*, 231

DEEDS AND CHARTERS.

See OBLIGATION *and* RELEASE.

DEER-STEALING.

See INDICTMENT.

DEFEASANCE.

See RELEASES.

DEFENCE.

See also PLEAS, *&c.*

Ancient demeſne pleaded, but does not make a defence; if this plea be accepted it is good, elſe not, *Ferrers v. Miller*, 21, 22

DEMAND.

See REQUEST.

DEMURRER.

See VERDICT.

DEPARTURE.

1. Defendant pleads conditions performed, plaintiff ſets forth the covenants, and aſſigns breach; defendant rejoins that he paid ſo much in money, and ſo much in taxes; this is a departure, *Count Anan v. Criſp*, 54, 55

2. The preciſe day in caſe is not material; and if the defendant forces the plaintiff to vary from it, it is no departure, *Heard v. Tenniſon*, 92

DEPUTY.

See AUTHORITY.

DEVASTAVIT.

See EXECUTOR.

DEVISE.

1. Deviſe of a term to *A.* and the heirs of his body; and if he dies without iſſue, living *B.* it is good to *B. Lamb v. Archer*, 44

2. Deviſe for fifty years to *A.* if *A.* ſhould ſo long live; and after to the heirs male of *A.* and for default of ſuch iſſue, to *B.* in tail; the remainder to the heirs male of *A.* is void, there being no freehold to ſupport it; and the remainder to *B.* takes effect preſently, *Goodright v. Corniſh*, 52

3. Deviſe to *A.* in caſe that within three years ſhe marries with *B* and if not deviſe over; propoſals were made and rejected, ſhe marries another perſon; decreed this was a condition precedent to the veſting the eſtate; which not being complied with, the eſtate to go over. *Quær. Berty v. Lord Faulkland*, 182

4. Deviſe to the firſt iſſue male of *A.* (*A.* having none at that time) is void, *Hilliard v. Gennings*, 278

5. Deviſe to *A.* for eleven years; "*Item*, "I give to the firſt iſſue male of *B.* and "his heirs of his body; and for default "of ſuch iſſue, to the firſt iſſue of *C.*" *B.* had not iſſue at the time, *C.* had; the deviſe to the firſt iſſue of *B.* is not good by way of remainder, there being no freehold to ſupport it, *Scattergood v. Edge*, 283, 284

6. Nor as an executory deviſe, it being *per verba de præſenti*, and not by way of remainder, *Scattergood v. Edge*, 284

7. Deviſe to one for life who is incapable, remainder over, he in remainder takes preſently, *Scattergood v. Edge*, 285

8. One ſeiſed of two houſes deviſes one of them to *A.* and her heirs, ſhe paying his legacies, in caſe his goods and chattels were not ſufficient; and if ſhe did not make proviſion for the payment of them in her life-time, the legatee might ſell the ſame, "and all the "overplus of my eſtate to be at *A.*'s "diſpoſal," and made her executrix; the ſecond houſe does not paſs, *Shaw v. Bull*, 592, 593

9. Words which of themſelves would diſinherit an heir at law, if joined with others which make them leſs forcible, ſhall not, *Shaw v. Bull*, 594

DIOCESE.

See ADMINISTRATIONS, BISHOPS, *&c.*

DISCONTINUANCE OF ACTIONS, PROCESS, &c.

See CONTINUANCE.

DISSENTERS.

See CHURCH OF ENGLAND *and* UNIVERSITIES.

DISTRESS.

1. Diſtreſs taken by the bailiff of the hundred of *A.* in the hundreds of *A.* and *B.* being contiguous; the bailiff of *A.* ſells in the hundred of *B.* having given notice; it is good, being an entire diſtreſs, which cannot be ſevered, *Walker v. Rumbald*, 76

2. And perſonal notice anſwers the intent of the act; and is more than it requires, *ibid.*

3. The goods of a ſhip may be diſtrained for the port-duties of goods ſhipped on board it, *Venkeſtine v. Ebden*, 216

4. If diſtreſs for *damage feaſant* die in pound, or eſcape, he cannot retake it; but if had been for rent, may diſtrain *de novo*, *Anonymous*, 397

5. Appearance in inferior courts, to be enforced by reaſonable diſtreſs, *Anonymous*, 610

6. Which if reſcued, ſteward may impoſe a fine, *ibid.*

7. Officer cannot for ſuch a fine break a houſe, *ibid.*

8. If diſtreſs eſcape out of pound, cannot bring treſpaſs, unleſs it appears it was without default, *Vaſpor v. Edwards*, 658

9. If cattle diſtrained be put in pound overt and die, action may be brought, or diſtreſs *de novo*, *Vaſpor v. Edwards*, 662

10. So if ſtole out of it, *ibid.*

11. As long as diſtreſs is detained, it is a bar in treſpaſs, *Vaſpor v. Edwards*, 663

12. Diſtreſs is not obliged to be put in common pound, but pound overt, *Vaſpor v. Edwards*, 654

13. The pound is the pound of the diſtrainer, though in another man's ſoil; which if broke, *parco fracto* lies, *ibid.*

14. Diſtrainer muſt take care to keep the pound, *ibid.*

15. If cattle diſtrained eſcape out of pound overt without diſtrainer's fault, treſpaſs revives, *Vaſpor v. Edwards*, 665

DISTRIBUTION.

See OCCUPANT.

1. No diſtribution in collaterals beyond brothers and ſiſters children of the inteſtate, *Pet v. Pet*, 409, 410

2. Spiritual court can never inforce diſtribution, unleſs there be no will; or a will directing it; chancery ſometimes does, *Anonymous*, 566

3. Niece not intitled to diſtribution with grandmother, *Blackborough v. Davies*, 619

DOWER.

1. Feme not to be endowed of *caput baroniæ*, that is really ſo; but of a capital meſſuage ſhe ſhall, *Gerrard v. Gerrard*, 84

2. Elopement being pleaded in bar of dower, feme replies, that her huſband ſold her to the adulterer, ill, *Coot v. Berty*, 232

E.

EJECTMENT.

1. Ejectment on a demiſe by a corporation aggregate was not ſet forth to be by deed, yet good; for the demiſe is confeſſed to be good, by confeſſing leaſe, entry and ouſter, *Anonymous*, 113

2. Ejectment brought on a demiſe ſubſequent; the bringing of the ejectment not amendable, *Puleſton v. Warberton*, 125

3. If tenant ſuffer judgment to go againſt him, without acquainting his landlord, the Court on motion will not ſuffer execution to be taken out, till the right be tried, *Anonymous*, 211

4. Service on a perſon who had the keys of the houſe, not good, *Anonymous*, 313

5. If ſuit be vexatious, the Court will not grant trial at bar in ejectment, without naming a ſufficient plaintiff, *Sherwin v. Clarges*, 318

6. A perſon who had judgment in ejectment, may bring debt or diſtreſs for rent, notwithſtanding a writ of error, and might have entered without a writ of execution; only executions by writ are ſuſpended by writ of error, *Badger v. Field*, 398

7. The Court will not make a rule to name a good leſſor in ejectment, without nonſuit or verdict, *Anonymous*, 445

8. A Judge of *niſi prius* may record a *retraxit* againſt one, and proceed againſt the others, *Gree v. Rolle*, 652

9. If one of the defendants die, ſuggeſtion may be of it, and proceed againſt the other, *Gree v. Rolle*, 653

10. In ejectment cannot be nonſuited as to one, and proceed againſt the other, *Gree v. Rolle*, 656

11. If one defendant will not appear, or confeſs leaſe, entry and ouſter, he ſhall be acquitted; and plaintiff may proceed againſt the others, *ibid.*

12. And judgment on the Judge's certificate, ſhall be againſt the caſual ejector, for ſo much as was in the hands of him who would not appear, or confeſs leaſe, &c. *ibid.*

13. Ejectment will lie for one tenant in common againſt another for an actual ouſter, *Gree v. Rolle*, 657

ELECTION OF ACTIONS.

See ACTIONS.

ELEGIT.

See RECOGNIZANCE.

ENTRY FORCIBLE.

1. On forcible entry, a reſtitution made after three years ſet aſide, *Rex v. Harris*, 268

2. What eſtate party had ſhould appear, *Rex v. Dorney*, 417

3. If inquiſition be quaſhed, reſtitution is not of courſe, *Anonymous*, 423

4. On conviction of forcible entry, the juſtices are upon view to remove it, and commit the offender; but cannot award reſtitution without inquiſition, *Anonymous*, 495

5. The record of commitment ſhould be in the preſent tenſe, elſe ill, *Rex v. Brown*, 516

ERROR.

1. Where two defendants join in pleading, and one dies after the *venire facias*, judgment ſhould be prayed againſt the living one only, elſe it is error, *Woolbridge v. Cloberry*, 1

2. An infant in replevin joined with others, appeared by attorney; this not aſſignable for error, becauſe might have been pleaded in abatement, *Cone v. Bowles*, 1, 2

3. Writ of error muſt be of a common return, elſe ill; where the writ of error is *ubicunque*, the *ſcire facias* ought to be on a common day, *Anonymous*, 5

4. No writ of error lies in the exchequer chamber on a *ſcire facias*, on a judgment affirmed there, *Hartop v. Holt*, 105

5. On writ of error out of county palatine of *Cheſter*, the plaintiff in error delayed to bring in the record; on a certificate from the king's bench office, that the record is not come, the chancery will grant execution of courſe, *Hodgeſon v. Segrave*, 127

6. Where there are two plaintiffs in error, and one dies, the death muſt be ſuggeſted on the roll before execution can be taken out, *Bennoyer v. Brace*, 130

7. Error brought on judgment in ejectment, pending which, treſpaſs will lie for the mean profits, *Dornford v. Ellys*, 138

8. Death of one plaintiff in error does not abate the writ, *Wicket and Foſt v. Cramer*, 240

9. Want of original aſſigned for error, an original of another Term, and no continuance, is no original, *Jenniſon v. Ellis*, 320

10. Error of a judgment in a recognizance on a *ſcire facias*, was *ſuper judicium*;

dicium; ſhould have been *ſuper recognitionem*, *Anonymous*, 371

11. Action laid in one county, and original ſued out in another, is error, *ibid.*

12. Error will not lie to a new created juriſdiction, which proceeds by methods different from common law, but *certiorari*, *Grenville v. College of Phyſicians*, 390

13. A perſon was burnt in the hand for felony: that there was no judgment of attainder, ſo error would not lie, but *certiorari*, *ibid.*

14. Perſon who has judgment in ejectment, may bring debt for rent or diſtrain, notwithſtanding writ of error pending, *Badger v. Floid*, 398

15. Executions by writ only are ſuſpended by writ of error, *ibid.*

16. On award of reſtitution on reverſal of attainder, *ſcire facias* ſhould go to the terre-tenants, elſe will be error, *Dillon v. Walcot*, 407

17. If plaintiff dies, pending a writ of error, and execution be taken out without acquainting the Court with it, it will be ſet aſide for irregularity, *Anonymous*, 494

18. In debt, if the original be recited to be *attach.* inſtead of *ſummonitus*, it is not error, being only recital, *Anonymous*, 513

19. Writ of error varying from the *placita*, does not remove the record; and execution may be ſued notwithſtanding ſuch writ, *Anonymous*, 523

20. To make *capias* returnable the ſame day ſummons is returnable, is error, *ibid.*

21. Releaſe of errors ſets irregular judgment right, *Anonymous*, 560

22. Writ of error cannot be diſcontinued without leave of the Court; and if error be not aſſigned, judgment will be affirmed, *Leving v. Calvry*, 561

23. After *capias* returned againſt the principal, may proceed againſt the bail on the recognizance, notwithſtanding a writ of error; for that is no *ſuperſedeas* of the recognizance, *Dundee v. Petty*, 567

24. Plaintiff in error cannot move to quaſh his writ of error before error aſſigned, *Anonymous*, 602

25. Writ of error *ad prox. ſeſſionem parliamenti*; and before that time it was diſſolved, and day fixed for the meeting of another, whether *ſuperſedeas* of execution, *Peters v. Benning*, 604

26. If a Term intervene between prorogation, execution may be ſued, by the opinion of *Hale* and *Keeling*, *Peters v. Benning*, 605

27. If writ of error be left with the lords, and a prorogation comes, it is a *ſuperſedeas*; but the writ of error is not diſcontinued, *ibid.*

28. Error aſſigned, that it was a bond taken *colore officii* for appearance, and not ſaid it was taken by name of ſheriff; cannot be aſſigned for error, but ſtatute ſhould have been pleaded, *Jones v. Sweetapple*, 634

29. Double error in fact aſſigned, is ill, *Gibbs v. Walkley*, 650

ESCAPE.

1. No good plea in debt, that the party was taken on freſh purſuit the day bill filed, the action being once attached, *Ball v. Briggs*, 31

2. If perſon in priſon on a conviction for a miſdemeanor eſcape, and is retaken before indictment found againſt the gaoler for the eſcape, he ought not to be troubled for the eſcape, *Rex v. Fell*, 227

3. If ſheriff ſuffer one in execution to eſcape, the plaintiff has his election to ſue the ſheriff or defendant; but he cannot have a *capias* without a *ſcire facias*, *Anonymous*, 210

4. By a *reddidit ſe* before a Judge the bail is diſcharged; but marſhal not chargeable for eſcape till notice of the *committitur*, *Watſon v. Sutton*, 583

5. See alſo *Anonymous*, 634, 635

ESTATES.

See DEVISES, DISCONTINUANCES, FINES, RECOVERIES.

ESTOPPEL.

In civil actions the recognizance is entered into by the bail only, and is therefore no eſtoppel to a defendant's peerage, *Robert v. Villars*, . 217

ESTRAYS.

See WAIFS.

ESTREATS.

See FINES *and* AMERCIAMENTS.

EVIDENCE.

See WITNESS.

1. On preſentment for not repairing a highway, nothing can be given in evidence, but that it is repaired; if pleaded they ought not to repair, muſt ſhew who ſhould, *Rex v. Hornſey*, 13

2. Where an original is evidence, the copy of it is, *Caſe of the Manor of Bray*, 24

3. A perſon claiming by the cuſtom no good evidence; but a tenant of a manor, who does not claim it, is, *ibid.*

4. Similitude of hands not ſufficient for an original foundation of attainder, though good circumſtantial evidence, *Rex v. Croſby*, 72

5. *Camden's Britannia* to prove a particular cuſtom, in evidence, refuſed as to the general hiſtory of the kingdom, which cannot otherwiſe be proved, had been good evidence, *Stayner v. Droitwich*, 85

6. Probate of a will undeniable proof of it, *Rex v. Rains*, 136

7. Printed proclamation, or printed act of parliament, though private, if concerns a whole county, good evidence, though not compared with the record, *Dupays v. Shepherd*, 215, 216

8. Anſwer in chancery, filed in the Six-Clerks office, is good evidence, *Anonymous*, 231

9. Evidence ſworn before coroner on indictment, cannot be read on trial, unleſs the witneſſes cannot be had, *Rex v. Kirk and Cage*, 305

10. Judge's hand to his certificate of the conviction of a malefactor to be proved, *Bignoll v. Rogers*, 310

11. Verdict in a civil cauſe may be given in evidence in a criminal cauſe; but not *vice verſa*; and new trial in a civil cauſe, which may be evidence in a criminal cauſe, ſeldom granted, *Richardſon v. Williams*, 319

12. A priſoner who had given a bond for his being a true priſoner, admitted a witneſs to prove a voluntary eſcape, *Rex v. Warden of Fleet*, 338

13. Conviction of battery at the ſuit of the king, cannot be given in evidence in treſpaſs on the ſame battery, *Rex v. Warden of Fleet*, 339

14. No record of conviction or verdict can be given in evidence, but ſuch as both parties might have produced, *ibid.*

15. Legacy charged on land by will, the probate of the will given in evidence, and poſitive proof of death of two of the witneſſes, and circumſtantial proof of the death of the third admitted, at the diſtance of fifteen years, *Anonymous*, 342

16. What would not be evidence for one, cannot be produced for the other, *Clarges v. Sherwin*, 343

17. Cohabiting with a woman, and owning her for his wife, good evidence to charge the man, *Car v. King*, 372

18. On avowry for rent-charge deviſed, as he was not intitled to the will, he produced the ordinary's regiſter of the will and former payments; good evidence, *Anonymous*, 375

19. Treſpaſs, and getting his wife with child; the declaration of the woman no evidence, *Adams v. Arnold*, *ibid.*

20. Trial at bar concerning the right of members of a corporation, the town-clerk ordered to attend with the charter, being only to try the right; though in ſtrictneſs not intitled to it,

becauſe copy may be had at the Rolls, *Cutt's Caſe*, 394

21. If tenant claim by copy, lord is only ordered to let them be ſeen, but not to bring them into court, *Cutt's Caſe*, 394. 494

22. Charters never compelled to be brought into court when copies may be had at the Rolls, *Anonymous*, 414

23. Wherever original is evidence, copy is, *Weſt v. Chamberlain*, 494

24. A man owning a deed under his hand, is good evidence, *Dillon v. Crawley*, 500

25. Evidence of a perſon's hand proved to be beyond ſea, allowed in *indebitatus aſſumpſit*, *Key v. Gordon*, 521

26. No evidence can be given of what was done at a former trial, till proceedings there be proved, *Anonymous*, 555

27. See alſo *Anonymous*, 565

28. To maintain action for a dog's biting another, it muſt be proved he knew his dog uſed to bite; and one inſtance is ſufficient, *Anonymous*, 555

29. *A.* being indebted to *B.* gives him a note in a feigned name, which note was run away with; *A.* pays *B.* the money, action is brought againſt *A.* on the note, *B.* is no evidence to prove the note run away with, *Anonymous*, 564, 565

30. Diſcourſe of a wife was given in evidence for defendant, on action brought by baron for debt due to the wife as a ſeparate dealer, *Anonymous*, 566

31. Copy of charter under the great ſeal no evidence, *Anonymous*, 579

32. Witneſſes hands admitted to be proved, if proved are dead, beyond ſea, or cannot be found after ſtricteſt enquiry, *Anonymous*, 607

EXCEPTION.

1. Where a thing paſſes by general words, it may be well excepted out of it by particular words, *Cudlip v. Rundall*, 14

2. Exception of a paſſage in a leaſe, being not part of the thing demiſed, but *dehors*, will amount to a reſervation, and covenant will lie, *Buſh v. Cole*, 24

EXCHANGE.

See BILLS OF EXCHANGE.

EXCHEQUER.

See PRIVILEGE OF PLACE.

1. No writ of error lies in the exchequer chamber, on a *ſcire facias* taken out on a judgment affirmed there, *Hartop v. Holt*, 105

2. If judgment given in *B. R.* for defendant be reverſed in exchequer chamber, an interlocutory judgment *quod querens recuperet*, muſt be given there, and *B. R.* award the writ of enquiry of damages, *Anonymous*, 153

EXCOMMUNICATION AND EXCOMMUNICATO CAPIENDO.

1. On the 23d of *Eliz.* for not coming to church, it is no plea, that he was excommunicate, being his own default, *Rex v. Larwood*, 69

2. Proceſs for excommunication may be ſerved on *Sunday*, notwithſtanding 29. *Car.* 2. *Brookbank v. Allanſon*, 275

3. The writ of *excommunicato capiendo* need not ſpecify the cauſe ſpecially, but ſhould appear on the *ſignificavit*, *Rex v. Fowler*, 418

4. *Excommunicato capiendo* for non-payment of coſts *in quodam negotio educationis puerorum*, without licence, ill, *Rex v. Hill*, 517

5. The cauſe of excommunication ought to be certainly ſet forth, *Rex v. Hill*, 518

6. Before the ſtatute, if the cauſe returned was inſufficient, ſhould go into chancery for a *ſuperſedeas*; but that cannot be done now, the writ is returnable in *B. R.* where, if it be wrong, it muſt be quaſhed, *Rex v. Hill*, 519

7. Excommunication pleaded in abatement muſt only be *quouſque*; for on abſolution

ſolution ſhall have re-ſummons, *Warner v. Green*, 580

EXECUTORS.

See DEBT.

1. Where only part of the executors appear and plead, judgment muſt be had againſt all; but execution *de bonis propriis* only againſt thoſe who appear, *Anonymous*, 10

2. Submiſſion to award by executors is a *devaſtavit*, *Anonymous*, 11

3. Pleading ſix judgments confeſſes aſſets for above five; and in replication ſhould not conclude to the country, but *hoc parat. eſt verificare*, *Ashton v. Sherman*, 153, 154

4. Money due on bond is of equal degree with money due for rent, whether on leaſe or parol; and payment of one is good plea in bar of the other, but not that ſo much is due on that account, *Cage v. Acton*, 291

5. Though a ſtatute be of higher nature, it is no *devaſtavit* to pay a bond before it, becauſe not due till broke, *Cage v. Acton*, *ibid.*

6. Suit may be againſt one both as heir and executor, *Anonymous*, 328

7. If executor ſuffer judgment to go againſt him by default, it is an admiſſion of aſſets; and the ſheriff may on the *fieri facias* return a *devaſtavit*, *Rock v. Sheriff of Saliſbury*, 411

8. Reaſon why executor on nonſuit is not to pay coſts, is his being ſuppoſed ignorant, *Anonymous*, 440

9. If rightful executor bring treſpaſs againſt *tort* executor, he may give evidence of payment of rightful debts in mitigation of damages; yet the right of action and verdict ſhall be againſt him, *Anonymous*, 441

10. If *tort* executor pay debts with the goods, the rightful executor ſhall not avoid the payment, though may maintain trover againſt the *tort* executor; but ſhall only recover in damages what he has miſapplied, *Parker v. Kett*, 471

11. Executor muſt plead all the judgments in force againſt him, elſe ſhall never have advantage of them, *Atfield v. Parker*, 496

12. If executor plead a judgment generally, he confeſſes aſſets for ſo much, and cannot after ſay he has aſſets to a leſs value, *Parker v. Atfield*, 527

13. If executor plead judgment ill, or it be found, on iſſue joined, kept on foot by fraud, he has confeſſed aſſets for it, *ibid.*

14. If on judgments pleaded plaintiff prays judgment when aſſets come, he ſhall not be chargeable till thoſe are paid, though had not money to do it at time of plea, 528

15. If iſſue be taken on the fraud which is found, but not found to have aſſets for the whole ſum, it ſhall not be intended there was more than confeſſed, *ibid.*

16. It ſeems if executor do not bring action within ſix years, it will be *devaſtavit*, *Hayward v. Kinſey*, 573

17. If inteſtate die within ſix years after action brought, and executor has time within ſix years, and does not purſue it, ſtatute will incur, *ibid.*

18. In pleading want of aſſets, the time muſt be ſet forth, *Ingram v. Foot*, 611

19. If executor plead a recognizance, he muſt ſet it forth; but of a judgment need only ſay in ſuch a court of *Weſtminſter* it was had againſt him; but if in inferior court, muſt give it juriſdiction, and ſay *taliter proceſſum fuit*, *Ingram v. Foot*, 613

20. Covenant to ſerve *A.* and his aſſigns for eight years; executor may bring covenant, averring he uſed the ſame trade, *Jackſon v. Bridge*, 650

EXECUTION.

See RECOGNIZANCE.

1. Death of one of the plaintiffs in error muſt be ſuggeſted on the roll before execution can be taken out, *Bennoyer v. Brace*, 130

2. The firſt *fieri facias* delivered to the ſheriff ſhould be firſt executed; but if he executes

executes one delivered afterwards firſt, the execution is good, and the party muſt have his remedy againſt the ſheriff, *Smallcomb v. Buckingham, &c.* 146

3. On a *levari facias* the cattle of a ſtranger *levant* and *couchant* on the land may be taken; for the writ is to levy *de exitibus terræ*, *Britton v. Cole*, 175. 177

4. But on *fieri facias* it is to take the goods, on *extendi facias* it is to take the lands *debitoris*, *Britton v. Cole*, 177

5. On judgment affirmed in *B. R.* on writ of error out of *Ireland*, a writ iſſues, reciting all the proceedings directed to the C. J. of *B. R.* in *Ireland*; and there execution is to be ſued out, *Coot v. Lynch*, 225

6. On *capias* the ſheriff has no power to receive the money, only to execute the writ, *Anonymous*, 230

7. Defendant in ejectment died between the firſt day of aſſizes and verdict; judgment is well entered notwithſtanding, *Robertſon v. Moor*, 241

8. Writ of execution teſted in Vacation not amended, *Johnſton v. Naylor* 247

9. *A.* in execution at the ſuit of *B.* charged in an action by *C.* who obtains judgment, he muſt be charged in execution by *committitur*, *Anonymous*, 313

10. If execution be taken out within the year, and the writ not returned, it may be continued by entry *vicecomes non miſit breve*, without *ſcire facias*, *Anonymous*, 377

11. Sheriff cannot receive money on *cap. ad ſatisfaciendum*, *Anonymous*, 385

12. Goods taken by *levari* cannot be delivered in execution, *Holm v. Hunter*, 494

13. Whether the ſuing out writ of error, or the notice of it, be the *ſuperſedeas*, *Quære. Spuraway v. Rogers*, 501

14. Writs of execution need no continuance, *Walker v. Humfrey*, 506

15. On debt on judgment, defendant pleads he was taken in execution, good plea, without averring the execution continues; for if there was eſcape, that ſhould be ſhewed of the other ſide, *Redmond v. Joſeph*, 541

16. Execution is good before return, but is not of record till then, *ibid.*

17. Render of principal in diſcharge of bail, is not a *committitur* till entered, *Anonymous*, 559

EXPOSITION OF WORDS.

Innuendo may explain a thing which was certainly expreſſed before, elſe not, *Rex v. Grieppe*, 139

EXTENT.

See RECOGNIZANCE.

EXTINGUISHMENT.

1. A promiſe cannot be extinguiſhed by a bill under hand alone, becauſe of no higher nature, *Stayner v. Baker*, 86

2. A bond given before marriage to the intended wife, conditioned to leave her worth ſo much, is not extinguiſhed by the marriage, *Cage v. Acton*, 288

EXTORTION.

See USURY.

F.

FACTOR.

See MERCHANTS.

FAIRS, MARKETS, TOLLS, AND MARKET OVERT.

1. In trover for goods, plea that bought them in market overt; muſt prove the ſale, and that it was at convenient time, *Burch v. Scory*, 309

2. A ſale of goods in a ſhop out of *London*, does not alter the property; and even there, if the felon be convicted on the owner's evidence, the property is not altered, *Anonymous*, 521

FEES.

1. A commiſſioner on a commiſſion to examine witneſſes, is intitled to fees, *Stockwell v. Colliſon*, 9

2. No fees are due for chriſtening or burial at common law, and if any by the canon law, laymen are not thereby affected; they can only be due by cuſtom, *Burdeaux v. Dr. Lancaſter*, 171, 172

3. A *Regiſter* cannot ſue in the ſpiritual court for his fees, *Ballard v. Gerrard*, 608

4. No Court has power to ſettle fees, *Ballard v. Gerrard*, 609

5. Are to be ſettled on a *quantum meruit*, *ibid.*

FEOFFMENTS.
See FINES, RECOVERIES, *&c.*

FIERI FACIAS.
See EXECUTION.

FINES AND AMERCIAMENTS.

1. On ſubmitting to a fine, the recognizance entered into for trial to be diſcharged, *Rex v. Moor*, 235

2. One convicted of a riot ſubmitted to a fine, and was diſcharged, *Rex v. Patting*, 317

3. Fine ought to be abſolute, and not conditional, *Anonymous*, 318

4. A perſon who has compounded an indictment for an offence of a public nature was fined, *Anonymous*, 602

FINES AND FEOFFMENTS.
See USES.

Fine levied by iſſue in tail, will make a leaſe made by his anceſtor to commence *in future*, good and unavoidable, *Symonds v. Cudmore*, 32

FORCIBLE ENTRY AND FORCE.
See ENTRY FORCIBLE.

FOREIGN ATTACHMENT.
See LONDON.

FORGERY.

Receiving money on a forged note, knowing the ſame, is a publication of the forgery; but if does not know of the forgery, it is no crime, and ſhall only anſwer civilly, *Rex v. Eller*, 494

FRANCHISES AND LIBERTIES.
See PALATINE COUNTIES.

1. Of franchiſes and liberties there are three ſorts; firſt, ſuch as exiſted in the crown before, as felons goods. Secondly, Thoſe created *de novo*, which exiſt though forfeited, as leet, markets. Thirdly, Thoſe which cannot exiſt but in perſons, and in them judgment ſhould be of *ouſter*, for the king cannot have them himſelf, *Rex v. City of London*, 18

2. If a fair or franchiſe is claimed, which is no charge to another's ſoil, *habere debuiſſet* pleaded will be good, *Anonymous*, 35

3. Where franchiſe has been pleaded, and allowed on record, ſhall be after allowed on motion; but not till then, *Hinton v. Hern*, 165

4. It is not neceſſary to have fifteen days return of a proceſs in a franchiſe, *Bidolph v. Veal*, 524

5. Conuſance of pleas is, that one within a juriſdiction may implead one within the juriſdiction for a matter ariſing there, *Croſſe v. Smith*, 643

6. Which muſt be demanded by the lord, *Croſſe v. Smith*, 644

7. Exempt juriſdiction is, that a perſon ſhall not be impleaded out of it; which he may inſiſt on or waive, *ibid.*

8. Franchiſe to hold pleas within a particular precinct, does not exclude any other juriſdiction, *Croſſe v. Smith*, 645

9. Cauſe may be removed by *habeas corpus*, *Croſſe v. Smith*, 646

10. To a *habeas corpus* it is no good return, have conuſance of pleas, *Taylor v. Reignold*, 666

11. If one within an exempt juriſdiction be ſued out of it, he muſt plead it, *ibid.*

12. Conuſance of pleas cannot be pleaded, but muſt be demanded by the lord, *ibid.*

G.

GAMING.

1. General *indebitatus aſſumpſit* will not lie for money won at play, though will againſt the perſon who held the ſtakes, *Walker v. Walker*, 69, 70

2. To the ſame purpoſe *per* HOLT, *Anonymous*, 81

3. A bill for *money won at play* ſhall not be recovered againſt by the holder, though taken *bona fide*, and for valuable conſideration, *Huſſey v. Jacob*, 97

4. On ſpecial mutual promiſe, action will lie for money won at play, *Walker v. Walker*, 258

5. If one hundred pounds is loſt to one, and after four hundred pounds to another, at one ſitting, both ſums are lawful, *per* HOLT; but held otherwiſe *per* TREBY, *Anonymous*, 336

6. See alſo *Anonymous*, 540

GOOD BEHAVIOUR AND SURETY OF THE PEACE.

1. To have ſurety of peace, affidavit muſt be of the cauſe of fear, and exhibited in articles; and affidavit that you deman[illegible] it not out of ill will or malice, but out of fear of ſome bodily hurt, *Anonymous*, 565

2. If a perſon who has no viſible way of livelihood live extravagant, it is cauſe to make him find ſureties for good behaviour, elſe not, *Elizabeth Claxton's Caſe*, 566

3. Juſtice of peace may judge who are lewd and diſorderly perſons, who may be held to their good behaviour, or ſent to the houſe of correction, *ibid.*

4. But if he aſſign a reaſon for his judging them ſo, which is not a good one, the commitment will be quaſhed, though he need not have given any, *ibid.*

5. Conſtables may commit lewd women till find ſureties for good behaviour, *Elizabeth Claxton's Caſe*, 567

GRANT.

Grant of a term for years *habendum* after the death of the grantor; the term paſſes preſently, and the *habendum* is void, *Germin v. Orchard*, 11

GRANTS OF THE KING.

1. Grant of an office by the king after the death, ſurrender, or forfeiture of a former grant at will, good, *Rex v. Kemp*, 77

2. Though eſtate at will of lands no ſurrenderable eſtate, becauſe at the will of both parties; but in caſe of grant of office of truſt by the king at will, it is only at will of the king determinable, for the perſon is fineable for refuſal, *Rex et Reg. v. Kemp*, 79

3. Freehold of land cannot commence *de futuro*; but offices not ariſing out of an inheritance, and being created *de novo*, may be granted *in futuro*, or on any contingency, *Rex v. Kemp*, 80

H.

HABEAS CORPUS.

1. Return to a *habeas corpus* that he was committed to the gaoler; and returns the order, which was, that *remaneat in cuſtodiâ* till he paid a fine of one hundred pounds; though the return be not good, yet there is a good judgment returned; ſo not diſcharged, *Rex v. Bythell*, 74, 75

2. Commitment by a ſecretary of ſtate good; but the ſpecies of treaſon muſt be expreſſed, elſe ill, *Rex v. Row and Kendal*, 82

3. Return, that he was committed to the keeper of *Newgate* by the court of aldermen, not good, becauſe does not appear that he was an officer of the city; though the Court in fact knows he is ſo, yet they cannot judicially take notice of it, *Rex v. Clark*, 113, 114

4. But if it appear that he is the proper officer, as to the marſhal of *B. R.* need not aver he is the proper officer, *Rex v. Clark*, 114

5. On *habeas corpus*, rule may be to bring the perſon up any day in the Term without filing it; but to bring him up a day in another Term, it ſhould be filed, *Rex v. Margaſon*, 441

6. Where the writ is returnable at a day certain, the perſon can only be brought up then; *aliter* if returnable *immediatè*, *Anonymous*, 564

7. Whether the *Habeas Corpus Act* extends to commitments by parliament, on action brought for not giving a copy of commitment within ſix hours, *Paulbill v. Powell*, 606

8. One committed by a Judge in his chambers, cannot be brought up without *habeas corpus*; one committed to the marſhal by rule of Court may, *Anonymous*, 641

9. To *habeas corpus* to inferior court, conuſance of pleas is no good return, *Taylor v. Reignold*, 666

HEIR, AND HEIR-LOOMS.

1. Suit may be againſt one both as heir and executor, *Anonymous*, 328

2. The lands of the heir are chargeable by bond of his anceſtor, as terre-tenant, and not as heir, *Anonymous*, 404

3. Heir, ſued as ſuch, not to be held to ſpecial bail, *Anonymous*, 511

4. Nothing but what is fixed to the freehold can be heir-loom, *Lord Petre v. Heneage*, 520

HIGHWAYS, RIVERS, BRIDGES.

1. On preſentment for not repairing a highway, nothing can be given in evidence but only that the way is repaired; if plea be they ought not to repair, they muſt ſhew who ſhould. That it is no highway cannot be given in evidence, but ſhould be traverſed, *per* HOLT. *Per* DOLBEN: May give in evidence, it is no highway, *Rex v. Hornſey*, 13

2. An indictment for not repairing a highway ſhould be againſt the pariſh, and not againſt the overſeers, *Rex v. Dixon and Others*, 198

3. The pariſh, of common right, ought to repair; juſtice of peace may preſent at quarter ſeſſions, and as much credit ſhall be given to it as if it were by jury, *Rex v. Ragley*, 409

HOMINE REPLEGIANDO.

See REPLEVIN.

HUE AND CRY.

See STATUTES.

HYPOTHECATION.

See ADMIRALTY.

I. and J.

IDEOT.

See LUNATICK.

JEOFAILS.

Want of *hic prolat.* helped by verdict, but on demurrer is ſubſtance, *Williams v. Saliſbury*, 30

IMPARLANCE.

See TENDER.

1. A foreign plea cannot be pleaded after imparlance; and to an imparlance it is not neceſſary to have entry made of *defendit vim*, *Lennox v. Boddington*, 307

2. Special imparlance, *ſalvis ſibi omnibus exceptionibus, tam ad breve quam ad narr.* which may be granted by the prothonotary; and may after it plead in abatement to the writ or count, *Anonymous*, 529

3. Another is *ſalvis ſibi omnibus exceptionibus et advantagiis quibuſcunque*, which can only be granted by the Court, and is diſcretionary; and after this may plead to the juriſdiction, *ibid.*

4. Whether

4. Whether perſon bound by recognizance to appear the firſt day of the Term, on entering appearance may imparle till the Term after, *Rex v. Fitzgerald*, 562

INDICTMENTS, INFORMATIONS, INQUISITIONS, &c.

See OUTLAWRY, JUDGMENT.

1. An information on a penal ſtatute for offence committed in *Yorkſhire*, will not lie, *Rex v. Hicks*, 30, 31

2 Indictment for foreſtalling *centum, &c. aves*, ANGLICE *turkies*, good, *Rex v. Wright*, 47

3. Exception was taken to an indictment for a riot, that it ſhould not conclude *contra formam ſtatuti*, it being an offence at common law; but the Court would not quaſh it, *Rex v. Bracy and Others*, 99

4. Where a ſtatute preſcribes that a thing ſhall be done by bill, plaint or information, it cannot be by indictment, *Rex v. Glutt*, 104

5. Inquiſition taken before coroner *certe credimus*, ill; for ſhould be certain, *Anonymous*, 112

6. Where a ſtatute appoints an indictment to be *ad generalem quarterialem ſeſſionem*, an indictment *ad generalem ſeſſionem* is ill, *Rex v. Tumock*, 117

7. Indictment for murder, he not having firſt ſtruck, not ſaying anything of a weapon drawn, ill, *Rex v. Keat*, 118

8. Information filed without the party's entering into a recognizance, as the ſtatute directs, is ill; but the Court cannot take it off the file, but may enter a *vacat*, or the irregularity with a *ceſſat proceſſus ſuperinde*, *Rex v. Lambert*, 154

9. Indictment for cauſing an apprentice to abſent himſelf from his maſter; the Court would not quaſh it on motion, but left the party to demur, *Rex v. Kitchner*, 195

10. Indictment is not to be quaſhed for want of addition, unleſs the party will take advantage of it, *Rex v. Sir H. Bond, Bart.* 198

11. A man was indicted with a wrong addition, and outlawed; he has no opportunity to plead it, but muſt either make uſe of the king's pardon, or ſay he was not the ſame perſon mentioned in the indictment, *Rex v. Fielding*, 199

12. All popular actions and proſecutions on penal ſtatutes made before 21. *Jac.* 1. muſt be in the county where the fact was committed, by the opinion of ten Judges, *Rex v. Gall*, 223

13. *Quo warranto* is in nature of a writ of right, to which defendant can have no plea, but to juſtify or diſclaim, and judgment is final; but in caſe of information in nature of a *quo warranto*, it is only final when againſt the defendant, *Anonymous*, 224, 225

14. Indicted for ſuffering a perſon to eſcape, being in his cuſtody *pro alta proditione præd.* it is ill; not ſhewing he was committed for high treaſon, *Rex v. Fell*, 226

15. Indictments for perjury, forgery, or maintenance are never quaſhed on motion, but muſt be pleaded to; but in reſpect of riots, and other offences of a public nature, are quaſhed on good cauſe, *per* SIR SAMUEL ASHTREE, *Anonymous*, 231

16. Indictment for ſelling bread under the aſſize, not to be quaſhed on motion, *Rex v. Flint*, 242

17. Information againſt tradeſmen for combining by covenants not to ſell under a ſet price, *Anonymous*, 248

18. Indictment for exerciſing a trade, not having ſerved ſeven years apprenticeſhip thereto *infra regnum Angliæ et Walliæ*, ill, *Rex v. Fox*, 251

19. Indictment for extortion, for taking fees for not carrying to a ſpunging-houſe, not quaſhed on motion, *Rex v. Beachcroft*, 255

20. Information for reſcuing one arreſted by Chief Juſtice's warrant in the Park, *Jordan's Caſe*, 257

21. Information for making a falſe return to a *mandamus*, *Rex v. Abingdon*, 308, 309

22. Information

22. Information for writing a letter, ſaying the king, &c. would ſoon be reſtored, *Rex v. Lawrance*, 311

23. Information for offering to buy votes for an election of parliament, *Rex v. Taylor*, 314

24. On rule for filing information, if there be a *non proſ.* for the non-appearance of the defendant, a new one cannot be without new rule, *Rex v. Warburton*, 319

25. An indictment for *maintenance* concluding *con. for. ſtat.* generally, cannot be tried under a *mittamus* deſcribing it as a particular ſtatute, *Rex v. Higginſon*, 322

26. Indictment for *reſcous* arreſted, the arreſt not being laid to be before the return of the writ, *Rex v. Hoſkins*, 323

27. After information filed, ſhall not ſtop it on account of there not being ſecurity for coſts, *Rex v. Town of Hartford*, 325

28. A ſecond information ſhall not be filed till the firſt is diſcharged; and coſts muſt be paid before *non proſ.* be entered, *Anonymous*, 325

29. Indictment or information will lie for taking away a will out of the ſpiritual court, where it was proved, *Deer's Caſe*, 325

30. On conviction of deer-ſtealing affirmed in *B. R.* a *levari* may go to ſheriff for the penalty, *Rex v. Speed*, 328

31. A perſon bound in recognizance to appear in *B. R.* was indicted for the ſame thing at THE OLD BAILY; his appearance ſhall be diſcharged, *Rex v. Bell*, 348

32. Information lies for putting wax to writs, as if ſealed, not being ſo, *Rex v. Hatcher*, 355

33. At common law, informations might be filed in the name of the Maſter of the Crown-office, without motion; but ſince the ſtatute, muſt be by leave of the Court, *Anonymous*, 398

34. Information filed for making wharfs on a river made navigable, and prohibited to be done by a private act of parliament, 398

35. Cottages not to be ſuppreſſed by indictment, *Rex v. Harris*, 406

36. Indictment for lying with another man's wife not to be quaſhed on motion, *Rex v. Sellinger*, 413

37. Indictment for ſaying to a juſtice of peace, in execution of his office, "You "ſpeak to me here, but dare not do "ſo in another place;" quaſhed, *Rex v. Walden*, 414

38. Information againſt a gaoler for letting a perſon taken on *excommunicato capiendo* go at large, *Anonymous*, 434

39. Indictment for uſing the trade of buying and ſelling cattle *apud D.* not ſaying where the expoſure to ſale was, quaſhed, *Rex v. Purſey*, 435

40. Indictment will not lie againſt an innkeeper for not receiving a ſick perſon, unleſs averred he was a traveller, *Rex v. Luellin*, 445

41. Indictment at common law for an offence puniſhable alſo on ſtatute determines election; and may purſue either way, not both, *Anonymous*, 446

42. Information for inveigling away a wife, and procuring people to ſell her goods, in order to charge the huſband, *Pocock v. Thornicroft*, 454

43. Information for ſetting up a lottery, and running away without drawing it, *Anonymous*, 495

44. Information for a cheat, not quaſhed on motion, *Rex v. Orbeville*, 499

45. Where a thing was a crime at common law, and ſtatute makes it more penal, indictment may be *contra formam ſtatuti*, or leave it out, *Anonymous*, 502

46. See alſo *Rex v. Mathews*, 502 *notis.*

47. Indictment for nuiſance, riot, &c. or any offence of a public nature, not to be quaſhed on motion; but in caſe of

of petit offences it has been often done, *Anonymous*, 502

48. Indictment *ad nocumentum* of a particular vill, not good, *Anonymous*, 504

49. If owner of a river neglect to ſcower it, whereby land is overflown, he is indictable, *Rex v. Wharton and Others*, 510

50. Indictment for attempting forcibly to carry away a lady of great fortune, *Rex v. Pigott*, 516

51. And a ſervant privy thereto alſo fined, *Rex v. Pigott*, *ibid.*

52. Indictment for procuring an attorney to be preſſed to ſea, *Rex v. Fuller*, 542

53. Information for pretending himſelf to be bewitched, *Hathaway's Caſe*, 556

54. Indictment for an offence of a public nature cannot be compounded, but of a private nature may; and the perſon compounding fined, *Anonymous*, 602

55. In information for nuiſance, the evidence being doubtful, jury were to have view by conſent, *Rex v. Clerk*, 626

56. A fact made felony by ſtatute, not indictable as a miſdemeanor, *Rex v. Croſſe*, 634

57. A perſon was indicted for perjury, who had a mind to have it tried, but the proſecutor entered a *non proſ.* which was ſet aſide, *Rex v. Cranmer*, 647

58. If a perſon be acquitted on a vicious indictment, he may be indicted a-freſh, *Rex v. Cranmer*, 648

INFANTS.

1. Infant chargeable for money lent him to buy neceſſaries, if ſo laid out; elſe not, *Ellis v. Ellis*, 197

2. Infant cannot be a bankrupt, *Rex v. Cole*, 243

INNS AND INN-KEEPERS.

See ALE-HOUSES.

INNUENDO.

See EXPOSITION OF WORDS.

INQUISITION.

See INDICTMENT.

INROLLMENT.

See BANKRUPTS.

INSTITUTION AND INDUCTION.

See BISHOPS.

JOINTENANTS, TENANTS IN COMMON, AND COPARCENERS.

1. Jointenancy muſt be pleaded in abatement, and not in bar, *Kemp v. Andrews*, 3

2. Coparceners muſt join in avowry, as they are but one tenant in a *præcipe*, much more in avowry, *Steaman v. Page*, 86

3. One jointenant may diſtrain for the whole rent, but when he avows, it muſt be for part in his own right; and make conuſance as bailiff to his companion for the reſidue, *Anonymous*, 96

4. The words "equally to be divided" in a deed, will not make a tenancy in common, as it does in a will, *Ward v. Everard*, 227

5. A copyhold ſurrendered to his five children, *equally to be divided* between them, held by two Judges againſt Holt to be tenancy in common; for that being to uſe, ſhould have like conſtruction as in wills; and being a ſurrender, to have like favour as wills, *Fiſher v. Wiggs*, 296

6. No expreſs words neceſſary to make jointenancy, or tenancy in common, only ſuch as ſhew intent, *cited, Fiſher v. Wiggs*, 299

7. Tenants in common have a ſeveral freehold, but joint occupation; jointenants one undivided freehold and occupation, *Fiſher v. Wiggs*, 301

8. But ſee further what words make a tenancy in common, in the caſes cited, 303 *notis.*

9. One

9. One tenant in common may have ejectment againſt the other for actual ouſter, *Johnſon v. Allen*, 657

10. But on it no mean profits are to be recovered, *Johnſon v. Allen*, *ibid.*

11. Not ſuffering the utmoſt profit to be made of the moiety, is an ouſter, *Johnſon v. Allen*, 658

12. But not raiſing rent is not ſo, *ibid.*

JOURNEYS ACCOUNTS.

1. Where a bill of *Middleſex* is taken out by four, and one dies, it abates the writ; and a new writ ſhould be taken out by the ſurvivors by *Journeys Accounts*, *Temple v. Biſhop*, 188

2. Does not lie for executor on abatement of the teſtator's writ, *Anonymous*, 229

3. See further on the ſubject of *Journeys Accounts*, *Kinſey v. Hayward*, 570

ISSUE GENERAL.

See PLEAS.

1. Matter of law, which amounts to the general iſſue, may be pleaded or given in evidence, *James v. Fowks*, 101

2. *Non aſſumpſit infra ſex annos* a ſpecial iſſue, *Brent v. Edwin*, 103

3. Muſt be between parties to the firſt writ, *Kinſey v. Hayward*, 572

ISSUES AND PROFITS.

1. The cattle of a ſtranger *levant* and *couchant*, on land extended by an outlawry, may be taken by *levari facias*, for are the iſſues of the land; but on a *fieri facias*, or *extendi facias*, nothing but the goods of the debtor can be touched, *Britton v. Cole*, 175, 176, 177

2. Iſſues forfeited by a juryman, tenant for life, ſhall affect the remainder; but doubtful whether outlawry of tenant for life ſhall affect the remainder, *Britton v. Cole*, 177, 178

JUDGE.

1. Where a power is given to hear and determine, the matter is not traverſable, *Grenville v. College of Phyſicians*, 388

2. Nor ſhall the Judges be liable to action or proſecution for what they do as ſuch, *Grenville v. College of Phyſicians*, 388, 392

3. Wherever there is power to fine and impriſon, it is a court of record, *Grenville v. College of Phyſicians*, 388

4. No averment to be received, that a Judge of record has acted againſt his duty, *Grenville v. College of Phyſicians*, 389

5. Information filed againſt a coroner for taking off a juryman after he was ſworn, *Rex v. Stukeley*, 493

6. Juſtice of peace is judge who are lewd perſons, and may commit without aſſigning a reaſon for his judgment; but if he aſſigns a reaſon for his judgment, which is not a good one, commitment will be quaſhed, *Eliz. Claxton's Caſe*, 566

7. Action will not lie by mayor and commonalty, in debt for a by-law in the mayor's court, *City of London v. Wood*, 672

8. No perſon can be party and judge, *City of London v. Wood*, 687

9. Though the mayor's court be held before the recorder, it is as deputy; and the ſtile of the court is the mayor, *City of London v. Wood*, 690

JUDGMENTS.

1. If judgment be given in *B. R.* for the defendant, which is reverſed in the exchequer chamber, the interlocutory judgment *quod querens recuperet* muſt be there; and *B. R.* award a writ of enquiry of damages, *Anonymous*, 153

2. Where judgment is to be for a corporal puniſhment, it cannot be in the abſence of the party, *Rex v. Harriſon and Duke*, 156

3. Regularly there ſhould be four days before the return of the *poſtea*, and judgment entered, if there are ſo many days of the Term, but judgment may be entered that Term, *Anonymous*, 250

4. Judgment

4. Judgment entered on a forged warrant of attorney ſet aſide, *Waley's Caſe*, 318

5. If there be a rule for judgment, it muſt be entered before the eſſoin-day of next Term, or elſe muſt go over by continuance, *How v. Acton*, 493

6. See alſo *Anonymous*, 519

7. Where a thing is made a *concilium*, judgment cannot be entered, or any alteration made without leave of the Court, *Vincent v. Preſton*, 667

JURY AND JURORS.

1. Maſter, by conſent, may ſtrike a jury in caſes of miſdemeanors, but not in capital caſes, *Rex v. Duncomb*, 224

2. If jury eat and drink, not at the charge of him for whom their verdict is; it ſhall not be ſet aſide for that cauſe, *Anonymous*, 250

3. Perſons on the grand jury, who found indictment, may be of the petit jury, *Rex v. Kirk and Cage*, 305

4. The attornies of both ſides may agree to name each twenty-four, out of which twenty-four to be returned by the ſheriff, *Turner v. Burnaby*, 564

5. But ſee 3. *Geo.* 2. c. 25. 564 *notis.*

JUSTICE OF PEACE.

See ENTRY FORCIBLE.

1. Indictment for making cables of old ſtuff, *contra formam ſtatuti*, which gives four times the penalty, to be recovered by plaint, bill or information; being before juſtices of peace, quaſhed for that reaſon, *Anonymous*, 514

2. But ſee further on this ſubject the caſes cited, 514 *notis.*

3. Juſtices of the peace for the county may do an act where it is ſaid ſhall be by thoſe of the diviſion, in an act of parliament, *Anonymous*, 546

4. Juſtices of peace are not abſolute as to accounts of overſeers of the poor, but appeal lies from them to the ſeſſions, *Anonymous*, 560

5. Juſtice of peace is judge who are lewd perſons, and need aſſign no reaſon; but if he aſſigns a reaſon for his judgment, which is not a good one, the commitment will be quaſhed, *Elizabeth Claxton's Caſe*, 566

JUSTIFICATION.

1. Immediate officer of a court cannot juſtify under a returnable proceſs, without ſhewing a return; but thoſe who act under them may, without ſhewing a return, *Freeman v. Bluet*, 396

2. Serjeant at mace is immediate officer of the Court, and proceſs for eſcape would lie againſt him, *Freeman v. Bluet*, *ibid.*

3. One may count on poſſeſſion, but not juſtify without making title, *Pell v. Garlick*, 509

4. Cannot order people to be whipt without oath made, *Anonymous*, 607

L.

LABOURERS.

See MASTER AND SERVANT.

LAWS COMMON, CANON AND CIVIL.

1. Convocation, with conſent of the king, may make canons to bind the clergy; and the diſobedience of them is cauſe of deprivation, *Biſhop of St. David's v. Lucy*, 238

2. And if alſo made a temporal offence, may proceed to deprivation, though not puniſh him as for a temporal offence, *Biſhop of St. David's v. Lucy*, 239

3. By the law of *England* before the Conqueſt, all children equally ſucceeded to real and perſonal eſtate, *Blackborough v. Davis*, 623

4. In *Henry the Firſt's* time daughters were excluded as to land, *ibid.*

5. But

5. But if were no children, went to father or mother; but between the reigns of *Henry the Firſt* and *Henry the Second*, father and mother were excluded, and collaterals let in, *Blackborough v. Davis*, 624

6. But no alteration ever made in reſpect of perſonal eſtate, *ibid.*

LAW CASES DENIED.

1. *Yelverton*, 158. denied, 47
2. 1. *Cro.* 64. *Sutton's Caſe*, denied, *ibid.*
3. 1. *Sid.* 400. 1. *Vent.* 8. denied, 223
4. 2. *Inſt.* 491. That a penſion cannot be ſued for in the ſpiritual court; denied, 416
5. 2. *Rol. Ab.* 462. p. 3. denied, 424
6. *Hob.* 81. held *contra.* 539
7. *Hetley*, 8. denied, 597
8. 1. *Sid.* 376. *per* HOLT, denied, 652

LEASES.

1. Covenant and entry amounts to a leaſe, *Copley v. Hepworth*, 1

2. Leaſe at will may be determined by either party, by loſs of accruing rent, *Anonymous*, 610

3. Leaſe for a year, and ſo on from year to year, is a leaſe for a year, and for another year, as ſoon as it is held under, *ibid.*

4. A leaſe for three years, to commence *in futuro*, by parol, is void by the ſtatute of Frauds, *Anonymous*, 610

LIBELLUS FAMOSUS.

Writing a libel is making a libel, *juxta tenorem ſequentem* imports the very words themſelves, *Rex v. Beere*, 218

LIBERTIES.

See FRANCHISES.

LIMITATIONS AND STATUTE.

1. Promiſe made after the ſtatute had incurred, that if would prove the delivery of the goods he would pay; this conditional promiſe takes it out of the ſtatute, *Heylin v. Haſtings*, 223, 224

2. The bare acknowledgment of a debt does not amount to a new promiſe, but is good evidence, *Heylin v. Haſtings*, 224

3. But ſee *contra Yea v. Fomaker*, 224 *notis.*

4. Statute of Limitations no good plea to *indebitatus aſſumpſit*, on promiſe to pay on demand, *Collins v. Benning*, 444

5. Whether an original ſued out in *Dorſetſhire*, above ſix years, and caſe thereon in *London*, within ſix years, will not prevent the ſtatute, *Hayward v. Kinſey*, 568

6. Actual entry muſt be to prevent the ſtatute, *Hayward v. Kinſey*, 573

7. If inteſtate die within ſix years, ſo as adminiſtrator had time to bring the action within ſix years, and does not, ſtatute will incur, *ibid.*

8. Not pleadable to a current account, *Cudmore v. Ellis*, 579

LONDON AND ITS CUSTOMS.

See BY-LAWS, CORPORATION.

1. In action of debt brought in *London*, if the goods of the defendant are attached in the hands of a third perſon, but not removed; on the cauſe being removed into *B. R.* by *certiorari*, the goods ſhall not then be delivered to the plaintiff, *Loveridge v. Whitrow*, 213

2. In *London* no exceptions are taken to bail, but there is an officer to take it; which if inſufficient, he muſt pay the debt, or the profits of his office will be ſequeſtered, *Adams v. Cox*, 249

3. The *Huſtings* is the county court in *London*, *Anonymous*, 320

4. Officer may take ſome reaſonable part of the defendant's goods to compel appearance; and on attachment of goods the cuſtom is to leave them in the party's hands till the matter be determined, *Anonymous*, 328

5. Cuſtom of foreign attachment muſt be ſpecially ſhewn, *Anonymous*, 407

6. The

6. The very record is never removed from *London*, *Anonymous*, 454

LUNATIC AND IDEOT.

1. Surrender by lunatic is abſolutely void, *Thompſon v. Leach*, 173

2. But feoffment by him is only voidable on account of the notoriety of it, *Thompſon v. Leach*, 173

3. Ideot cannot gain a ſettlement, *Anonymous*, 322, 323

M.

MAIHEM.

See TRESPASS.

MANDAMUS.

See CORPORATION.

1. *Non fuit debite electus* a good return, being a direct anſwer to the writ, which recites *licèt fuit debite electus*, *Rex v. Lambert*, 2, 3

2. Return to a *mandamus* to reſtore *A.* to his place of alderman was, that he had removed out of the city; and *licet* being ſummoned to attend, he did not, held good return *per* three Judges againſt HOLT, who held a particular ſummons was neceſſary to ſhew why he ſhould not be diſfranchiſed; for he might have good reaſon of abſence, as ſickneſs, which by this way he would be deprived of ſhewing, *Rex v. Glide*, 27, 28

3. If a crime, for which a perſon is removed, is not well ſet forth in the return, peremptory *mandamus* ſhall go, *Rex v. Shaw*, 113

4. Return to a *mandamus* good, though there be neither the hand of the mayor or ſeal of the corporation to it, *Rex v. Mayor of Exeter*, 126

5. If a return be falſe, action lies againſt the body politic, and againſt a particular perſon for procuring a falſe return, *ibid.*

6. *Mandamus* to admit a perſon to his freedom, having ſerved ſeven years apprenticeſhip, *Rex v. Morrice*, 150

7. *Mandamus* muſt be delivered to him who is to make the return, *Rex v. Mayor of Exeter*, 251

8. Return ought to be by the mayor, with the conſent of the major part of the corporation; and if he does it, not having ſuch conſent, information will lie againſt him for falſe return, *Rex v. Borough of Abingdon*, 308

9. In caſe for a falſe return to a *mandamus*, need not alledge that they ought to obey it; for by making a return that is admitted, *Mayor of Norwich's Caſe*, 322

10. Cannot ſue out a joint *mandamus*, for the wrong done to one is not ſo to another, *Rex v. Andover*, 332

11. Two cannot bring action for falſe return to *mandamus*, *Butler v. Rews*, 349

12. Return to *mandamus* requires the greateſt certainty, becauſe it cannot be helped by pleading, *Rex v. Abingdon*, 401

13. Where a new juriſdiction is created by act of parliament, *B. R.* may command the execution of it by *mandamus*, *Rex v. Glamorganſhire*, 403

14. Action for falſe return is local, but may be laid either where the return was, or where it is of record, *Lord v. Francis*, 408

15. If perſon be irregularly choſe, and after is regularly entered in the Books, or elected to a ſuperior dignity, evidence of an election not to be controverted, *Lord v. Francis*, *ibid.*

16. If officer makes an ill return, he ſhall be amerced; if makes a ſecond ill, attachment ſhall go, *Anonymous*, 410

17. It is a good return to a *mandamus* to ſwear a perſon in a common-council man, that he had not taken the oaths purſuant to 23. Car. 2. *Rex v. Love*, 601

18. No *mandamus* to ſwear in a Regiſter, but ſhould have aſſize, *Ballard v. Gerrard*, 609

19. *Mandamus*

19. *Mandamus* to ſwear in a ſteward of a copyhold manor refuſed, *Anonymous*, 666

MANOR.

See COPYHOLD.

MARKETS.

See FAIRS.

MARRIAGES.

See BARON *and* FEME.

MARINERS.

See ADMIRALTY.

MARSHAL AND MARSHALSEA.

1. A ſteward of the priſon was put in by one who had only an eſtate for life in the office of marſhal; the marſhal was for miſdemeanor removed by act of parliament; whether he be removable by the ſucceeding marſhal, *Quære*, *Sutton's Caſe*, 557

2. Held *per* HOLT, That ſuch an officer put in for life was not removable by a ſucceeding marſhal on the ſurrender of the eſtate of the marſhal for life, becauſe he could do nothing to defeat his own grant; and that a removal by act of parliament for his own offence was his own act, *Sutton's Caſe*, 557, 558

3. But as the ſucceeding marſhal is anſwerable for his priſoners, whether one can be impoſed upon him was the doubt, *Sutton's Caſe*, 558

4. If one by proceſs of *B. R.* be turned over to the marſhal, and by *habeas corpus* is turned over to the *Fleet*; *per* HOLT, That ſhall not hinder declaring againſt him *in cuſtodiâ*, *Anonymous*, 566

5. Tipſtaff is marſhal's officer, and commitment to him is to the marſhal, *Anonymous*, 634, 635

MASTER AND SERVANT.

See NOTICE.

1. When a perſon is made maſter of a ſhip, he has the appointing of the crew; for as he is anſwerable for all events, he ſhould have the election of thoſe he can confide in, *Roſiere v. Sawkins*, 434

2. Servant or deputy not chargeable as ſuch for neglect, only for misfeaſance; but recourſe to be to the principal, *Lane v. Cotton*, 488

3. Lieutenant of a man of war may give moderate correction, but not wound, *Anonymous*, 504

4. If a ſervant uſually employed to borrow money, or pawn goods, for the maſter, do it, debt will lie againſt the maſter, *Anonymous*, 564

MAXIM.

Quælibet narratio ſuper breve debet locari in comitatu in quo breve emanavit, *Hayward v. Kinſey*, 568

MELIUS INQUIRENDUM.

See CORONER.

MERCHANTS, MERCHANDIZE, AND FACTOR.

See BILLS OF EXCHANGE, MASTER.

1. *Ley merchant* is *jus gentium*, and part of the common law; and the Court ought to take notice of it when pleaded, *Meggadow v. Holt*, 15, 16

2. By bill of loading the property is conſigned over, and he may bring action; and the invoices ſignify nothing, *Evans v. Martel*, 156

3. The captain of a ſhip inſured may be changed without notice to the inſurers, *Anonymous*, 325

4. Joint traders are jointly charged, if there be no ſpecial agreement, *Anonymous*, 446

5. Factor of common right is to ſell for ready money, unleſs the uſage be in ſuch particular goods to ſell for credit, *Anonymous*, 514, 515

6. If there be no ſuch uſage, and ſale is on truſt, the factor is only liable, and ſuch ſale is a converſion in him; and if the ſale be not in market overt, no property is thereby altered, *Anonymous*, 515

7. The remedy againſt a factor is account; but if he convert goods, trover will lie, *Anonymous*, 602

MISFEASANCE, &c.

See ACTIONS *on the* CASE.

MISNOMER.

See ABATEMENT, ADDITION, NAMES, *and* VARIANCE.

MODUS DECIMANDI.

See TITHES.

MONEY.

1. Where foreign coin is demanded, the action is in the *detinet*, and the averment that the defendant has neither rendered it nor the value, *St. Leger v. Pope*, 81

2. Money allowed to be brought into court in *aſſumpſit*, becauſe payment goes to the iſſue; but in trover it goes only to the damages, and not allowed to be brought into court, *Burman v. Shephard*, 90

3. Covenant on three diſtinct covenants, one of which was for non-payment of rent, refuſed to let money be brought into court; for when plaintiff has juſt cauſe of action, will not oblige him to go to trial for the reſidue, on peril of coſts, *Paulet v. Heathfield*, 95

4. But ſee *Hallet v. Eaſt India Company*, 95 *notis*

5. Guineas are coined at *the Mint* for 20s. and at that rate are lawful money without proclamation, *Dixon v. Willows*, 100

6. Money may be brought into court on *aſſumpſit*, but not on a *quantum meruit*, *Smith v. Johnſon*, 187

7. See how money came to be brought into court, *Giles v. Hart*, 153

8. Money not to be brought into court on covenant, *Lawley v. Dibble*, 241

9. In debt on a bond for foreign money, declares for ſo much *Engliſh* value, *Brown v. Gullock*, 541

10. If action be brought for foreign money, it is detinue, *ibid.*

11. When ſuit is on a counterbond, or where there is a pretence of a collateral agreement, principal and intereſt not allowed to be brought into court, *Coke v. Heathcot*, 598

12. Money not to be brought in on *quantum meruit*; but the way is to confeſs the employing, and that he deſerved but ſo much; and plead a tender; to which plaintiff may reply, he deſerved more, and ſo come to iſſue, *Anonymous*, 614

13. If a *quantum meruit* and *indebitatus* be in the ſame declaration, money may be brought in on the *indebitatus*, which will affect the other, *ibid.*

14. But ſee the modern practice upon this ſubject, *Hallett v. Eaſt India Company*, 614 *notis*

15. On bringing money into court, the courſe is to pay coſts ſo far, if plaintiff will take it out; but if it be ſuch an action that defendant may plead tender in bar of coſts, and that plaintiff to cuſt him of that would reply a ſpecial *capias* of a precedent Term, all this may be ſettled on motion, *Anonymous*, 633

MOTION.

See MONEY.

1. Act made on diſbanding the army that ſoldiers ſhould be free from ſuits for three years: a ſoldier cannot be diſcharged on motion, but muſt plead the act, *Crouch's Caſe*, 336

2. *Scire facias* on wrong judgment ſet aſide on motion, *Anonymous*, 351. 393

3. If a cuſtom-houſe officer be indicted for forgery, the Court will not make a rule to produce the cuſtom-houſe books, *Anonymous*, 543

MURDER.

See APPEAL, INDICTMENT.

1. Where perſons are doing an unlawful act, and murder enſues, it is murder in all, and it is lawful for any one to command the king's peace and ſuppreſs them; and ſuch attempt to ſuppreſs them is not ſuch a provocation to make killing manſlaughter, *Aſhton's Caſe*, 256

2. If perſons quarrel on a ſudden, and for conveniency go out of the Park to fight, and death enſue on this ſudden quarrel,

quarrel, it is not murder, *Rex v. Kirk and Cage*, 304, 305

3. Several perſons being met to do an unlawful act, one fires a gun and kills one of his own party, it is not murder, not being found he ſhot at the king's officers, who oppoſed, *Rex v. Plummer*, 627

4. If it had, had been murder, though killed one of his own party, *Rex v. Plummer*, *ibid.*

5. If one ſhoot, intending to kill one, and kill another, it is murder, *Rex v. Plummer*, 628

6. In general, if two are engaged in an unlawful act, and a man is killed, all are guilty of murder, *Rex v. Plummer*, 629

7. But if he knew not of the particular malicious deſign, which was diſtinct from what engaged in, it is not murder, *ibid.*

8. The act of one, whereby murder follows, muſt be in purſuance of the original unlawful deſign, *Rex v. Plummer*, 630

9. If in a fray a conſtable, not known to be ſuch, is killed, it is not murder, *Rex v. Plummer*, 631

10. If a perſon in ſuch a fray declare he comes to keep the peace, is killed, it is the ſame as if he was known to be a conſtable, having equal power for that purpoſe, and is murder, *ibid.*

11. But in a riot, if any perſon be killed in purſuance thereof, all concerned are guilty of murder, *ibid.*

12. The deliberate act ought to be to the hurt of ſomebody, *Rex v. Plummer*, 632

13. Or if not againſt a perſon, yet muſt be a felonious act, or carried on with a felonious intent; it is murder, elſe not, *ibid.*

N.

NAMES OF PURCHASE AND DIGNITY.

Grant to a man by the name of *knight* who was only an *eſquire*, is void, *Rex v. Biſhop of Cheſter*, 185

NE EXEAT REGNUM.

See WRITS.

NISI PRIUS.

1. Ejectment againſt ſeven, who all appear, plead, and join iſſue on the plea-roll; the *jurat.* and *diſtringas* were againſt ſeven; the iſſue on the *niſi prius* roll was joined only by five, and verdict againſt ſeven: the *niſi prius* roll is amendable, for the Judge had ſufficient authority to try the cauſe, *White v. Biſhop of Worceſter*, 107

2. The reaſon why the *niſi prius* is on the *diſtringas* is, that the jury may be returned above, and the parties know them, *Anonymous*, 370

3. On information, not guilty pleaded, the defendant at *niſi prius* confeſſed the action; either no notice ſhould be taken of the *niſi prius*, or ſhould ſhew the jury were called, *Rex v. Chaloner*, 377

4. *Cognovit actionem* may be entered there, *Gree v. Rolle*, 653

5. Pleas *puis darrein continuance* may be recorded there, *ibid.*

6. Day in bank and *niſi prius*, as to pleading, are the ſame, *Gree v. Rolle*, 654

NOBILITY.

See PEERS.

NOLLE PROSEQUI.

See NONSUIT.

NON COMPOS.

See LUNATIC.

NONSUIT, NONPROS, RETRAXIT.

1. Nonſuit not to be ſet aſide without conſent, *Crawley v. Blewitt*, 127

2. Nonſuit may lie in Term-time, *Muſgrave v. Eſtcourt*, 417

3. Proſecutor entered a *non proſ.* of indictment of perjury, and that ſet aſide, *Rex v. Cranmer*, 647, 648

4. Judge of *niſi prius* may enter a *retraxit* againſt one, and proceed to trial againſt the others in ejectment, *Gree v. Rolle*, 651

5. *Retraxit* is only an agreement not to proceed, and is not a confeſſion of having no cauſe of action, *Gree v. Rolle*, 653

6. *N prof.* does not amount to a releaſe, *Gree v. Rolle*, 654

NOTICE.

1. Muſt be perſonal notice before attachment will go for not performing an award, *Anonymous*, 257

2. If ſervant, who had power to draw bills of exchange in his maſter's name, draw bills after he was out of his ſervice, if it be ſo ſhort a time after as the world could not take notice of it, it ſhall bind the maſter, *Harriſon's Caſe*, 346

3. When exception is taken to bail, notice ſhould be given to defendant's attorney, *Anonymous*, 435

4. Should be notice of motion to make ſubmiſſion to award a rule of court, *Anonymous*, 525

NUSANCE.

1. Indictment of nuſance for keeping gunpowder, *Anonymous*, 342

2. But ſee the ſtatutes on this ſubject, 342 *notis*

3. There muſt be apparent danger; and though had been done ſo for many years, if it be a nuſance it will not make it lawful, *Anonymous*, 342

4. If at the time of ſetting up the houſe in which the gunpowder was kept no houſe were near, but after others built, it is at the peril of the builder, *Anonymous*, *ibid.*

5. A thing that will be a nuſance when completed, yet cannot be abated till it be actually ſo, *Rex v. Wharton*, 510

6. If the owner of a river neglect to ſcour it, by which land is overflowr, he is indictable, *Rex v. Wharton*, *ibid.*

7. *Git* of the action in nuſance is the damage, and therefore evidence may be given of conſequential damages; not ſo in trespaſs, which is one entire act, *Caſe of the Farmers of Hampſtead Water*, 519

8. On information for nuſance, evidence being doubtful, jury to have view by conſent, *Rex v. Clerk*, 626

9. Tenant for years erects nuſance, for which damages are recovered, he aſſigns the term; the nuſance is continued, action may be brought either againſt him or his aſſignee, *Roſewell v. Prior*, 635

10. But ſhall be only one ſatisfaction; *per* HOLT, *Roſewell v. Prior*, 640

11. Before *Weſt.* 2. c. 24. lay not againſt the erector after aſſignment, *Roſewell v. Prior*, 637

12. *Quod permittat* lies only againſt the tenant of the freehold, *Roſewell v. Prior*, 639

13. Erector is liable for all conſequential damages, which he cannot purge by aſſignment over, *ibid.*

14. Action lies for the continuance of it, *ibid.*

15. *Quære*, Whether it be waſte in alienee to abate a nuſance, *Roſewell v. Prior*, 640

O.

OATHS AND AFFIDAVIT.

1. On admiſſion to freedom, quaker's ſolemn affirmation ſufficient, *Morrice v. Mayor of Lincoln*, 190

2. Quaker, on demanding ſurety of the peace, muſt take the uſual oath, *Hilton v. Byron*, 243

3. After affidavits filed, and day given for hearing Counſel, none ſhall be read which contain new matter, *Anonymous*, 326

OBLIGATION.

1. Bond is no ſatisfaction for money due, though it may be for money before it is due, *Young v. Rudd*, 86

2. Though a bond be in words ever ſo improper, if the intent of the parties can be collected it ſhall be good, *Cromwell v. Grunſdale*, 193

3. Judgment a good plea in ſatisfaction of a bond, *Rowe v. Neeaham*, 248

4. Bond to ſue with effect is not forfeit by ſuing injunction, *Duke of Ormond v. Ireland*, 320. 380, 381

5. Bond for performance of covenants; plea, that for the breaches he had recovered damages in covenant, no plea in bar, for ſhews the bond was forfeit, *Pierce v. Hutchiſon*, 321

6. Obligation to do an impoſſible thing is ſingle, *Wall v. Grovett*, 418

7. Bond for forty *liberis* good, *Holmes v. Barneham*, 495

8. Bond diſcharges *aſſumpſit* by extinguiſhment, being of a higher nature, *May v. King*, 537, 538

9. On debt on a bond, plea that plaintiff agreed to accept a bond in ſatisfaction of the firſt bond, it is ill, for it is no more than a covenant, and not a releaſe, *Baber v. Palmer*, 539

10. Bond may be ſatisfaction of the condition of another bond before forfeited; *aliter* if after, *Baber v. Palmer*, *ibid.*

OCCUPANT AND OCCUPANCY.

Eſtate *pur autre vie* only aſſets in reſpect of creditors, and not chargeable with legacies, unleſs thereout expreſsly given; and the executor or adminiſtrator, if no debts appear, will be occupant, and is not diſtributable, *Oldham v. Pickering*, 103

OFFICE AND OFFICERS.

See JUSTIFICATION.

1. Regiſter's officer of *Landaff* may be granted to two; and a judicial office may as well be granted to two as a miniſterial, *Jones v. Beau*, 10

2. Clerk of the peace not removable but on miſdemeanor, for has a freehold; and articles in writing muſt be exhibited againſt him, *Rex v. Evans*, 13

3. The cuſtody of the rolls belongs to the *cuſtos rotulorum*; the making them up belongs to the clerk of the peace, who is a diſtinct officer, and not a ſervant to the *cuſtos rotulorum*, *Rex v. Evans*, 13

4. Clerk of the peace not removable by a new *cuſtos rotulorum*, for has a freehold in his office, *Harcourt v. Fox*, 42

5. Bond given by deputy to be accountable for half the profits of an office, not being within 5. Edw. 6. this bond is good, not being for a ſum certain, *Culliford v. Cordonny*, 90

6. *Cuſtos rotulorum* may appoint clerk of the peace by parol, *Saunders v. Owen*, 199

7. Pariſh clerk cannot ſue for a ſalary in ſpiritual court, *Anonymous*, 583

ORDERS OF JUSTICES OF THE PEACE.

See POOR, APPRENTICE.

1. Order of ſeſſions on appeal is final, though the ſtatute does not expreſsly ſay ſo; and the court of king's bench cannot examine the fact, but only quaſh the order, if contrary to law on the face of it, *Anonymous*, 20

2. Two juſtices of the peace removed a poor man from *H.* to *B.* which the ſeſſions reciting, and that he had rented a farm of ten pounds *per annum* at *H.* ordered that he ſhould be ſettled at *H.*; reſolved, that the ſettlement at *H.* being the place from whence he was removed, is a reverſal of the firſt order, *per* two juſtices, *contra* HOLT, who held, it ſhould have appeared he had been ſettled there forty days, *Anonymous*, 20

3. It is not neceſſary to ſay he rented a houſe of ten pounds *per annum*; the order muſt be on complaint of the overſeers and churchwardens, elſe the juſtices have no juriſdiction, *Rex v. Wootton Rivers*, 89

4. Order made by juſtices, who are not ſaid to be of the diviſion, good, for the ſtatute is only directory, *Rex v. Aſhley*, 138

5. Appeal from order of juſtices muſt be to the next general ſeſſions, and not to the next general quarter ſeſſions, *Rex v. Shaw*, 203

6. Order of ſeſſions quaſhed, being "likely to become chargeable, as we "are credibly informed," *Bloxam v. Kingſton*, 323

7. Order made conditional, "if *B. R* be "of ſuch opinion," quaſhed, *Grindon v. Overcott*, *ibid.*

8. Seſſions can only affirm or quaſh orders on appeal, and have no power to make an order, *Overcott v. Grindon*, 376

9. *B. R. ex debito juſtitiæ* is bound to confirm order, if nothing appears why it ſhould be ſet aſide, *Overcott v. Grindon*, *ibid.*

10. In order of juſtices in adjudication of the reputed father of a baſtard child, muſt appear that one of them was of the *quorum*, and that the examination was by two, *Rex v. Somerton*, 393

11. Order to remove a man and his family ill; ſo of him and his children, *Rex v. Kirford*, 398

12. When two juſtices make an order they may certify it to the ſeſſions; and then the ſeſſions are legally poſſeſſed of it, and removable by *certiorari*, *Rex v. Marlborough*, 402, 403

13. Servant hired for a year ſhall not be removed for being got with child, *Rex v. Marlborough*, 403

14. But ſee *Rex v. Brampton*, 403. *notis*

15. Both juſtices in making order muſt examine, *ibid.*

16. And ſee the caſes cited, 403. *notis*

17. Order of ſeſſions for aſſeſſing towards repair of a bridge removed by *certiorari*, 403

18. Juſtices cannot order a ſum of money to be paid for drawing indentures of apprenticeſhip, but ſhould order a rate to levy ſo much *per* week till convenient ſum be raiſed, *Anonymous*, 417

19. Order confirmed on appeal is concluſive, *Rex v. Longcritchill*, 419

20. Seſſions may originally make order for diſcharging apprentice, and may order maſter to refund part of the money; it muſt appear that maſter was ſummoned, *Rex v. Dillon*, 498

21. See alſo *Rex v. Johnſton*, 553

22. If order of juſtices be quaſhed in *B. R.* the order of ſeſſions falls, *Anonymous*, 548

23. If order of juſtices be confirmed on appeal, the appellants are concluded, *Anonymous*, *ibid.*

24. Five juſtices ſhould not join in an order of ſeſſions; *per* HOLT, *Anonymous*, 559

25. Seſſions quaſhed an order of juſtices, and before the poor perſon comes back juſtices make a new order, it is ill, *Gedſtone v. Grindſtone*, 633

26. To remove a perſon, muſt be adjudication is likely to become chargeable, *Halſtead v. Melford*, 667

27. Order to remove wife and children to the laſt ſettlement of the huſband ill, for children might have another ſettlement, *Halſtead v. Melford*, *ibid.*

28. Order confirmed on appeal is final to that pariſh; ſo if it be not appealed from, *Rex v. Minton*, 648

ORDINARY.

See ADMINISTRATION.

Donative is exempt from the ordinary's juriſdiction; yet the clerk of it may be puniſhed by eccleſiaſtical cenſures, but not to deprivation, *Finch v. Harris*, 640, 641

ORPHANS.

See LONDON.

OUTLAWRY.

See ISSUES.

1. Perſons outlawed for felony, Court cannot give judgment againſt them, unleſs are preſent, it being for a corporal puniſhment, *Rex v. Harriſon and Duke*, 156

2. The cattle of a ſtranger *levant* and *couchant* on land extended on an outlawry may be taken by a *levari facias*, *Britton v. Cole*, 179

3. If an outlawed perſon, before inquiſition, alien, it prevents the king's perfancy of the profits; *aliter* if the alienation be after inquiſition, 176

4. King is not entitled to real eſtate, or chattels real, without office, but to chattels perſonal he is, 177

5. Not ſaying *pro com.* an exception, *Anonymous*, 337

6. When cauſe of action accrues at a time a perſon is outlawed, plea of outlawry overthrows the writ, and after removal of outlawry muſt begin *de novo*; but where the diſability comes after the cauſe of action accrued, the plea of outlawry is only a temporary diſability, and does not abate the writ, but only *quouſque*, *Lady Falkland v. Stanion*, 400

7. If a perſon who is viſible be outlawed, the outlawry ſhall be reverſed at the charge of the plaintiff, *Hill v. Wilks*, 413

8. By outlawry a leaſe for years is forfeit before ſeizure; and if ſold before ſeizure the king ſhall avoid the ſale, *Anonymous*, 438

9. Feme covert outlawed without baron diſcharged on motion, *Sarah Griffith's Caſe*, 444, 445

10. Outlawry of treaſon reverſed, not ſaying where the court was held, *Rex v. Yeates*, 542. 544

11. Before outlawry for murder be reveried, a *ſcire facias* muſt go to all the lords mediate and immediate, or attorney general muſt confeſs on record that there are no lands or tenements, *Rex v. Young*, 544, 545

12. See alſo *Rex v. Biſhop*, 626. 668

13. In error to reverſe outlawry for matter of law, need not give bail to the original action, as muſt for want of proclamations, *Wilbraham v. Doley*, 545

14 Special bail to reverſe outlawry is to anſwer condemnation; other ſpecial bail is, or to render body to priſon, *Wilbraham v. Doley*, 545, 546

OVERSEERS.

See POOR.

P.

PALATINE COUNTIES.

1. The ſtile of the juſtices in *Durham* is always itinerant, and there there is no great ſeſſions, *Lamb v. Jeniſon*, 181

2. If perſon be in cuſtody of marſhal for cauſe, he may be proceeded againſt for matter ariſing within county palatine, *Wilbraham v. Lownds*, 535

PARCENERS.

See JOINTENANTS, &c.

PARDON.

1. Where a crime is pardoned, all the conſequences thereof are diſcharged, *Rex v. Greenvelt*, 119

2. If the king grant away his fines, that does not extinguiſh his power of pardoning, for that is inſeparably annexed to him, *ibid.*

PARISH, TOWN, VILL.

1. Pariſh may tax themſelves to carry on a ſuit for the good of the pariſh; but in ſuch rate the majority will not bind the reſt, as in caſe of other rates, *Rex v. Everard*, 440

2. A chapel's having ſacramentals only will not make it independent of the pariſh, *Anonymous*, 504

3. Vill and village are the ſame; a hamlet is a diviſion of a vill; the whole vill is a conſtabulary, *Anonymous*, 546

PARISH CLERK.

See OFFICER.

PARLIAMENT.

See PRIVILEGE.

1. If member of parliament ſue one at law, he may be brought into equity without breach of privilege, *Anonymous*, 343

2. Writ of error *ad prox. ſeſſionem parliamenti*, and before that time it be diſſolved, and day fixed for a new one, whether it be a *ſuperſedeas* of execution, *Peters v. Benning*, 604

3. If proceedings be on impeachment, and then the parliament be diſſolved, may proceed in another parliament, *Peters v. Benning*, 605

4. If Term intervene between a prorogation, execution may be, by the opinion of HALE and KEELING, *ibid.*

5. If writ of error be left in the lords, and there be a diſſolution, execution may be taken out; but the writ of error is not diſcontinued, *ibid.*

PARSON, VICAR, AND CURATE.

1. The freehold of the church is in the parſon, and no one can preach in it without his leave, *Turton v. Reignolds*, 433

2. None can preach without licence of the ordinary, which he ought to grant *ex debito juſtitiæ* to one who is fit; but if will not do it, the remedy is appeal, not *mandamus*, *Turton v. Reignolds*, *ibid.*

PAWNS.

See PLEDGES.

PEACE, SURETY OF.

See GOOD BEHAVIOUR.

PEERS OF THE REALM.

1. Indictment for murder by the name of *C. K.* pleads in abatement *miſnomer*, and that he was Earl of *Banbury*; and held good plea, *Rex v. Knowles*, 55

2. In civil actions the recognizance is entered into by the bail only; and ſo no eſtoppel to a defendant's peerage, *Roberts v. Villars*, 217, 218

PERJURY.

1. Where a thing is expreſſed with certainty before, an *innuendo* may relate to it, and explain it; elſe not, *Rex v. Gripe*, 159

2. In ſwearing off a contempt may be perjury, *Rex v. Sims*, 511

PLEAS AND PLEADING.

1. Where a thing may be pleaded in abatement, that ſhall not be aſſigned for error, *Cone v. Bowles*, 1

2. Jointenancy muſt be pleaded in abatement, and cannot be pleaded in bar, *Kemp v. Andrews*, 3

3. *Touts temps priſt* cannot be pleaded after imparlance; but on a bond after imparlance, tender may be pleaded, and *uncore priſt*, *Anonymous*, 8

4. *Hoc parat. eſt verificare* only form, *Morley v. Vivian*, 38

5. Plea in bar, that he was adminiſtrator, and not executor, ill, *Harding v. Salkill*, 46

6. Writ of error depending in exchequer chamber, no plea in debt on a judgment, *Anonymous*, 48

7. Plea, that the indorſee was a bankrupt at the time of indorſement, good plea; but muſt plead that a commiſſion was taken out, *Haker v. Goodwin*, 50

8. Plea that he was adminiſtrator, and not executor, *unde petit judicium quod, &c. non reſpondere debeat*; this would have been a good plea in abatement if properly concluded, which ſhould have been *quod billa ceſſetur*; not being ſo, it is ill, *Bower v. Coke*, 83

9. If a thing be to be done *by* a man, or his aſſigns, muſt ſhew it in the disjunctive; but if *to* a man and his aſſigns, need not mention his aſſigns; he muſt ſhew he has aſſigned it over, *Smith v. Sharpe*, 86

10. Another action, pending for the ſame cauſe, may be pleaded *prout patet per recordum* before the original filed, or iſſue entered on record, *Armitage v. Rose*, 91

11. In all caſes where a perſon admits the action, were it not for ſome ſpecial matter, that may either be ſpecially pleaded, or given in evidence, *Huſſey v. Jacob*, 97

12. In ſpecial pleading, wherever the defendant ſheweth a cauſe of action in the plaintiff, either expreſs or implied, and confeſſeth and avoideth it, it is a good plea; but without allowing a cauſe of action, it amounts to the general iſſue, *Hallet v. Birt*, 121

13. Foreign plea muſt be ſworn to, but a plea to the juriſdiction is not a foreign plea,

plea, and ſo need not be ſworn, *Cholmley v. Bloom*, 123

14. If *alien-nee* is pleaded in bar the place of his birth muſt be ſhewn; if in abatement, it is triable where the action is brought, *Ord v. Howard*, 125

15. When outlawry is pleaded in abatement, a *capias*, or ſome ſuch thing, muſt appear; and not conclude *prout patet per recordum*, as when it is pleaded in bar, *Anonymous*, 132

16. Wherever an action is commenced by bill, praying judgment of the count is a plea in bar; and in caſe of plea in abatement of the count, muſt not pray judgment of the count, and that the count may be quaſhed, but that the bill may be quaſhed, *Leaves v. Bernard*, 133

17. Variance between the writ and the count cannot be pleaded without craving *oyer*; for though it be in court, it is on a diſtinct roll from the count, *Bragg v. Digby*, 189

18. Action pending in inferior court no plea in bar to action brought in ſuperior court for the ſame cauſe, *Brinſly v. Gold*, 204

19. Plea of other action pending in *C. B.* not ſupported by action diſcontinued, *Marley v. Blunt*, 307

20. If in bar defendant fail of giving colour where neceſſary, that may be remedied by the plaintiff's replication, *Anonymous*, 316

21. If one come in on a *capi corpus* in cuſtody, he muſt plead *inſtanter*; *aliter* where he has been bailed, and come in on the *capi*; *ſed per* HOLT, there is no reaſon of the difference, *Anonymous*, 372

22. It is no true rule, that where the defendant may plead the general iſſue, and give the ſpecial matter in evidence, he ſhall not plead ſpecially, *Paramour v. Johnſton*, 376, 377

23. Wherever matter in law, which avoids the cauſe of action, may be pleaded generally; and that given in evidence, that may be pleaded ſpecially, *Paramour v. Johnſton*, 377

24. On all general iſſues, ſpecial matter may be given in evidence, if colour be given. 377

25. If one is bound to ſave harmleſs againſt a particular thing, defendant ſhould ſhew how he has done it; but if it be to ſave harmleſs generally, *non damnificatus* will do, *Anonymous*, 406

26. If the plea be ill, and breach is ill aſſigned by replication, plaintiff ſhall not have judgment, *Anonymous*, 407

27. Where there is matter in bar to be pleaded, and omitted, it ſhall not be given in evidence, *Rook v. Sheriff of Saliſbury*, 412

28. Where bond is given for doing a thing which lies in demand, the bond is not forfeit till demand; of which the defendant muſt take advantage by pleading *ſemper paratus*. If he ſhould plead performance generally, and plaintiff aſſign breach, defendant cannot rejoin want of demand, for that would be departure, *Levius v. Randall*, 413, 414

29. If on *ſcire facias* returned, defendant do not plead what he may have in diſcharge, he loſes the advantage of it, *Anonymous*, 441

30. If one be to plead in bar in *Michaelmas, craſt. Animarum* will do; *aliter* if in abatement, *Anonymous*, 442

31. Either general iſſue ſhould be pleaded, or colour be given, *Saunders's Caſe*, 513, 514

32. Where *reſpondeas ouſter* is awarded, where judgment final ſhould have been, it is not error, being for plaintiff's advantage, *Sianney v. Slanney*, 525

33. If plea begin in abatement, and conclude to action, it is ill, if plea in bar be not ſufficient, *ibid.*

34. If plea commence in bar with good matter, and conclude in abatement to the writ, it is well, *ibid.*

35. In plea amounting to the general iſſue, colour ſhould be given, *May v. King*, 537

36. After attorney made and entered on record, cannot plead there was no ſuch

such perſon as the plaintiff, *Ball v. Smith*, 539

37. Term cannot now be aſſigned without writing, but need not be ſo pleaded, but to come in evidence, *Birch v. Bellamy*, 540

38. But wills of lands being created by act of parliament, all the circumſtances muſt be ſet forth, *Birch v. Bellamy*, 540, 541

39. On debt on a bond, payment of part *puis darrein continuance* may be pleaded in bar, *Pearce v. Packſtone*, 541, 542

40. But not ſo in contract, becauſe may be given in evidence, *Pearce v. Packſtone*, 542

41. On pleading a deed, and *profert* of it, it remains in court all the Term; but letters of adminiſtration do not, *Roberts v. Arthur*, 598, 599

42. When a plea begins with a *quoad*, it muſt be reſtrained to what that refers to, *Vincent v. Preſton*, 603, 604

43. Plea in bar is good to a common intent, *Vaſpor v. Edwards*, 663, 664

44. Replication muſt have a general certainty, *Vaſpor v. Edwards*, 665

PLEDGE AND BAILMENT.

A man may have debt for money due to him, notwithſtanding his having a pawn, *Anonymous*, 564

POLICIES OF INSURANCE.

See MERCHANTS.

POOR, POOR's RATES, VAGRANTS.

See JUSTICES OF THE PEACE, ORDER OF JUSTICES, APPRENTICES.

1. A boy put out for a year to learn to ſhave and make wigs, on covenants entered into, to which the boy was no party, gains no ſettlement, *Rex v. Jeriſon*, 132

2. Seſſions may ſet aſide a poor's rate, and make a new one themſelves, or order one to be made by the churchwardens, &c. *Rex v. Shoreditch*, 212

3. Service of a year by two different contracts, is a good ſervice for a year to gain a ſettlement, *Bridget Bailey's Caſe*, 224

4. If overſeers of poor be convened before two juſtices to account, the remedy is to appeal to the ſeſſions, *Anonymous*, 251

5. Vagrant ſent to the place of his birth, may be ſent to the place of his laſt legal ſettlement, *Anonymous*, 319

6. A child follows the ſettlement of its parents, unleſs he gain a diſtinct ſettlement. Idiot, ſince 1. *Jac.* 2. follows the father's ſettlement, *Anonymous*, 322, 323

7. Poor perſon ſent by order of juſtices from *A.* to *B.* which order was quaſhed on appeal, does not hinder the pariſh of *A.* from ſending him to other place of ſettlement, *Rex v. Kingſton Lowſey*, 323

8. Spiritual court cannot make a rate themſelves, but can excommunicate the pariſh for not doing it, *Blank v. Newcomb*, 327

9. Poor perſon removed by order of juſtices to *Oxfordſhire*, the juſtices there remove him to *Berkſhire*; the firſt order is concluſive till reverſed on appeal, *Rex v. Shippingfarringden*, 370

10. Though *B. R.* will not affirm an order, are not obliged to quaſh it, *ibid.*

11. Settlement of father is ſo of child, *Spitalfields v. St. Andrew's*, 383

12. No notice requiſite of a ſervant's coming into a pariſh to gain a ſettlement, *Anonymous*, 441

13. When overſeer contracts debts on account of the poor on his own credit; when he receives poor's money ſufficient, it is his own debt, *Anonymous*, 552

POWERS.

1. Power to make leaſes, except the demeſne lands of the manor; under his copyhold land cannot be let, being parcel of the demeſne of the manor, *Winter v. Lovedurr*, 147, 148, 149

2. Where

2. Where a power is given, and after comes a qualification of the power, which is not as extenſive as the power, that part of the power may be executed without purſuing the qualification, *Winter v. Lovedurr*, 151

PRESCRIPTION.

Vicar claimed a ſtipend by preſcription, ill; for none but a corporation or body politic can preſcribe, *Birch v. Wood*, 249

PRINCIPAL AND INTEREST.

See MONEY.

PRISAGE.

See SUBSIDIES.

PRIVILEGE OF PERSONS.

See ATTORNEY.

1. In an action *qui tam*, privilege may be pleaded, and he may plead in the negative, without making a full defence, *Kirkham v. Wheeley*, 74

2. Where it appears in pleading that a perſon is actually in cuſtody, he cannot have privilege, *Duncomb v. Church*, 102

3. Privilege of parliament does not protect a man where ſecurity of the peace is deſired, *Rex v. Culpepper*, 108

4. Being in cuſtody of the marſhal, on bail filed, does not hinder an attorney of his privilege, unleſs he be in actual cuſtody, *Stone v. Bodiner*, 112, 113

5. Bill cannot be filed againſt an attorney in Vacation; it muſt be *ſedente curia* the laſt day of the Term; if attorney and other are joined, he loſes his privilege, and both muſt be declared againſt in cuſtody, *Broadwaite v. Blackerby*, 163, 164

6. If officer plead his privilege by writ, his being an officer cannot be denied, *Anonymous*, 181

7. Any plea of privilege may be to a declaration againſt one in cuſtody of marſhal, if he be wrongfully there, *Hilbraham v. Lownds*, 535

8. If attorney be *in cuſtodiâ mareſ.* for want of bail, or if puts in bail, it ſhall not hinder him of privilege; becauſe cannot plead it till bail, *Wilbraham v. Lownds*, 535, 536

PRIVILEGE OF PLACE.

1. In caſe of exempt juriſdiction pleaded, muſt ſhew have juriſdiction of the matter, and that the cauſe ariſes within it, *Duncomb v. Church*, 102

2. *Temple* no privileged place; nor can any exemption be good without ſetting up a juriſdiction to do juſtice; but bailiffs ſhould not come to execute proceſs there; if they do, the way is to ſubmit to the proceſs, and the Judges will lay them by the heels, *Brown v. Borlace*, 155, 156

PROHIBITION AND CONSULTATION.

See CHURCH.

1. Prohibition to the ſpiritual court, on a ſuit there for words, not to be granted after ſentence, *Coke v. Hawkins*, 13

2. Suit in ſpiritual court to annul an inceſtuous marriage, pending which one of the parties dies, prohibition ſhall go *quoad* annulling the marriage, *Hicks v. Harris*, 35

3. Prohibition *quoad* anſwering on oath in a ſuit for adultery, *Anonymous*, 40

4. Prohibition to ſpiritual court on ſuit there to deprive a chancellor, *Jones v. Biſhop of Landaff*, 47

5. Prohibition may be to the ſpiritual court after ſentence, if it appears on the face of the proceedings that have no juriſdiction; elſe not, *Chickham v. Dickſon*, 132

6. If it appear on the face of the proceedings, that the admiral has not juriſdiction, may be prohibited at any time, *Rex v. Brcom*, 134, 135

7. Prohibition to grand ſeſſions, who ſubpœnaed a man who had an eſtate within the juriſdiction, but lived out of it, *Trantor v. Duggan*, 138. 172, 173

8. On ſuit for tithes, ſuggeſtion of a *modus*, the ſuggeſtion muſt be proved; elſe a prohibition, *Gardener v. Booth*, 196

9. Where it does not appear on the libel or proceedings, that the ſpiritual court has not juriſdiction, no prohibition ſhall be after ſentence; but if it does, it ſhall, except in caſe of ſuing out of the dioceſe, which muſt be taken advantage of before ſentence, *Pool v. Gardner*, 206, 207

10. Libel in ſpiritual court for calling a woman "whore," and ſaying ſhe "kept a bawdy-houſe," being after ſentence; not to be prohibited, *Anonymous*, 236

11. A man living out of a dioceſe may be cited for ſubſtraction of tithes within it, being not within 23. *Hen.* 8. c. 9. 252

12. Cannot ſue in ſpiritual court for anything, where cuſtom is denied, but penſion, *Machil v. Malton*, 260. 397

13. Motion for prohibition to the chancery, *Dair v. Earl of Stamford*, 313

14. Suit may be in ſpiritual court for fraudulently taking away a will, which had been proved there, not prohibited, *Deer's Caſe*, 325

15. Suit in ſpiritual court for a mortuary if cuſtom be not denied, *Oldham v. Rightſon*, 326

16. Spiritual court cannot make a rate, but excommunicate for not doing it, *Blank v. Newcombe*, 327

17. All controverſies concerning ſeats in the church determinable before the ordinary, unleſs where ſeat claimed by preſcription, *Anonymous*, 401

18. Suit by a vicar, claiming a duty by preſcription, for finding a perſon to officiate at a chapel of eaſe, *Stone v. Jones*, 404

19. Prohibition on a libel for a pariſh rate for mending an organ, *Anonymous*, 416

20. No prohibition on ſuit for a mortuary if cuſtom be not denied by plea, *ibid.*

21. Suit may be in ſpiritual court againſt a woman for incontinency after the death of the man, though ſhe ſuggeſted a marriage, *Anonymous*, 419

22. See alſo *Hemming v. Price*, 432

23. Marriage *de facto* not to be avoided after death of a party, *Hemming v. Price*, *ibid.*

24. In prohibition, either of the contending parties may be plaintiff, *Anonymous*, 423

25. Though it appear on the face of the libel, that the ſpiritual court has no juriſdiction, will not grant prohibition without ſuggeſtion, *Blaxton v. Honore*, 435

26. Prohibition may go to a pretended court, *Anonymous*, 445

27. If declaration be by him who ſued prohibition, and no plea in due time, judgment may be by *nihil dicit*; but if on the other ſide, conſultation, *Turton v. Rainier*, 447

28. Suit in ſpiritual court for ſalary of a pariſh clerk, prohibited, *Anonymous*, 583

29. Libel in ſpiritual court for cohabitation with a woman, who for a conſiderable time, and to the day of the citation, lived within the dioceſe; motion for prohibition, on ſuggeſtion ſhe lived out of the dioceſe, refuſed, *Fenwick v. Lady Groſvenor*, 610

PROOF.

See EVIDENCE *and* WITNESSES.

PROPERTY.

1. Property of things *feræ naturæ* is in the owner of the ſoil, while they are there, *Sutton v. Moody*, 144

2. If a man ſtart game in his own ground, and kill it in another's, it is his by reaſon of the firſt ſtarting, *Sutton v. Moody*, 145

3. By bill of loading the property is conſigned, and he may bring action, and the invoices ſignify nothing, *Evans v. Martell*, 156

4. By receiving money, and putting it into a bag, the property is altered, and

and detinue will lie for it, *Carter v. Shepherd*, 189

5. *A.* employs his father to buy goods for him, which he does, and pays part of the money; the property is in the father, and a ſubſequent bill of ſale to the ſon will not deveſt the property, *Anonymous*, 344, 345

6. Earneſt does not alter the property, but only binds the bargain, *Anonymous*, 345

7. Sale of goods in a ſhop out of *London* does not alter the property; nor even there, if felon be convict on owner's evidence, *Anonymous*, 521

Q.

QUANTUM MERUIT.

Where two promiſes are laid, one well and the other ill, one ſhall not vitiate the other; unleſs it appears to be for the ſame thing, ſhall not be ſo intended, *Weſt v. Cole*, 157

QUARE IMPEDIT.

Two jointenants of advowſon made partition to preſent by turns; one granted over his ſhare, the grantee may alone bring *quare impedit*, *Philips v. Biſhop of Saliſbury*, 321, 322

QUOD PERMITTAT.

See NUSANCE.

R.

RECITAL.

See EVIDENCE.

RECOGNIZANCES, STATUTES, ELEGIT, &c.

1. In execution on *elegit* the ſheriff muſt deliver no more than a moiety; if it appears that he did, the execution is void, *Pullen v. Purbeck*, 355

2. And if that appear on the face of the record, it is *ipſo facto* void, and needs no judgment or *audita querela* to avoid it; as it would if it did not appear on the return, *Pullen v. Purbeck*, 368

3. If on *elegit* return be, that has no lands, may have new execution; but if any lands are found, is concluded, *Pullen v. Purbeck*, 357

4. Appearance on recognizance for keeping the peace never diſcharged till the end of the Term, unleſs attorney general comes in and deſires it, *Rex v. Foſter*, 448

5. Debt on recognizance ſaid *deberi* is well, *Beech v. Trevors*, 600

RECORDS.

1. Plea in abatement, and judgment thereon, ſhould be entered on the iſſue-roll, and not to make two rolls, *Dunbarton v. Chancellor*, 189, 190

2. On *nul tiel record* pleaded, a day is given to bring it in, *Moor v. Manucaptors of Garrett*, 214

3. If bail be perſonated, record may be vacated, *Beckman's Caſe*, 257

4. *Scire facias* againſt bail, who pleads no *capias* iſſued; plaintiff replied there did, *prout patet per recordum*; ill, *Grant v. Burton*, 267

5. If record be pleaded, it muſt be ſhewn where it is, *Anonymous*, 318

6. When a record of the ſame court is pleaded, the replication muſt be either *nul tiel record*, or crave *oyer* of it, and not join iſſue on it; if it be of another court, may reply *nul tiel record*, and day is given to bring it in, *Creamer v. Wickett*, 350, 351

RECOVERIES COMMON.

1. If tenant gain the freehold any time before judgment, it is good, *Lacy v. Williams*, 261

2. Rent-charge to *A.* in tail, remainder to *B.* in tail; *A.* ſuffers recovery and dies without iſſue, the remainder is barred, *Anonymous*, 513

RECUSANTS.

See CHURCH *of* ENGLAND.

REFUSAL.

See TENDER.

RELEASE AND DEFEASANCE.

1. Two deeds made at the ſame time, and not having reference to each other, not to be conſtrued defeaſances, *Clayton v. Kynaſton*, 221

2. Record of judgment is defeazable by bond or deed, *Anonymous*, 229

3. *Non proſ.* againſt one defendant, is no releaſe as to the reſt, *Rex v. Serjeant*, 320

4. Releaſe does not diſcharge a note given the ſame day, *Anonymous*, 401

5. If covenantee covenant to ſave covenantor harmleſs, it is a defeazance of the covenant, *Lacy v. Kynaſton*, 415

6. Where a thing is to be done on a condition precedent, releaſe of all demands given before condition performed, does not diſcharge it; for before that it does not lie in demand, *Thorpe v. Thorpe*, 455, 460

7. Where are mutual promiſes, releaſe will bar action before performance, *Thorpe v. Thorpe*, 459

8. Indenture made by *A.* and *B.* to ſave *C.* harmleſs, is not a defeaſance of a covenant wherein *A.* is bound to pay *C.* a ſum of money, *Lacy v. Kynaſton*, 548

9. If a defeaſance be to one of the parties, it is ſo to all, *Lacy v. Kynaſton*, 550

10. Where it may be collected deed intends mutual remedies; it ſhall not be conſtrued a defeazance, *ibid.*

11. Defeazance is, that when the condition be performed, the thing defeazanced ſhall ceaſe, *ibid.*

12. If *A.* and *B.* be jointly and ſeverally bound to *C.* and covenants not to ſue *A.* it is not a defeazance, *Lacy v. Kynaſton*, 551, 552

REMEDIES.

See ACTIONS.

RENDER.

See BAIL.

RENTS.

See DAY *and* RELEASE.

REPLEVIN, AVOWRIES AND HOMINE REPLEGIANDO.

1. In a *homine replegiando* muſt plead *inſtanter*, without imparlance, *Anonymous*, 9

2. In a *homine replegiando*, if the party appear on the day of the return of proceſs, and pleads *non cepit, ſuperſedeas* ſhall go to the *withernam* without bail, *De La Baſtile v. Reignald*, 36

3. Avowry was only for part of a rent; how the reſt was ſatisfied muſt be ſhewn; *Johnſton v. Baynes*, 84

4. Bailiff or not, traverſable in replevin, *Trevilian v. Paine*, 97

5. It is doubtful whether hundred court can hold a plea of replevins; but if may, it muſt be in court, *Hallet v. Birt*, 120

6. Property in a ſtranger a good plea in bar, *Parker v. Meller*, 122

7. Whether in avowry or rejoinder a title muſt not be ſet forth, *Chaloner v. Clayton*, 188

8. In avowry, whenever title is made under a particular eſtate, the commencement of it, and the original whence it is derived, muſt be ſet forth in pleading, *Silly v. Daly*, 190, 191

9. Whether in avowry for a rent-charge all the lands charged ſhould not be named; and not with an *inter alia*, *Orby v. Pullen*, 319

10. In avowry as bailiff for rent, his being bailiff not traverſable, *Goudier's Caſe*, 321

11. In replevin, bringing money into court on tender of rent is ſuperfluous, for money is not demanded, but whether diſtreſs be well taken; *aliter* in debt on bond, *Horn v. Luines*, 352

12. In tender of rent on avowry, *obtulit* is neceſſary, and *paratus* not ſufficient, *Horn v. Luines*, 353

13. Replevin

13. Replevin and *alias* are not returnable, but the *pluries* is, *Freeman v. Bluet*, 397

14. If appearance be entered before *elongat.* returned, no *withernam* ſhould go, *More v. Watts*, 425

15. *Withernam* is the proceſs on the *elongat.* returned, *ibid.*

16. *Non cepi* may be pleaded on the *elongat.* returned, and then need not give bail; but if pleads *non cepi* on the *withernam*, he muſt, *ibid.*

17. The bail muſt be in a ſum certain, and in nature of gage deliverance, *More v. Watts*, 426

18. *Non cepi* may be pleaded on return of *withernam*, *ibid.*

19. If cattle be taken in *withernam* by way of execution in replevin, the plaintiff has property in them; but not where it is only a proceſs, *More v. Watts*, 428

20. If the iſſue be againſt one who is bailed in *withernam*, he is to be again in cuſtody, *ibid.*

21. If againſt one who appeared on the *elongat.* returned, and pleaded *non cepi*, *withernam* ſhall go, *More v. Watts*, 428, 429

22. By appearing and pleading on the *withernam*, all proceedings ſtay till iſſue determined, *ibid.*

23. Are demandable on the return-day, *ibid.*

24. In *pluries* replevin, there is a day in court, *More v. Watts*, 430

25. If plaintiff is demanded, and will not declare, ſhall be nonſuited, *More v. Watts*, 431

26. Where the writ is againſt ſeveral, muſt declare againſt thoſe who appear, and continue proceſs againſt the others, *ibid.*

27. On removal of replevin by *certiorari* out of inferior court into *B. R.* the declaration cannot be changed, *Anonymous*, 453

28. Whether ſecond deliverance be a *ſuperſedeas* of writ of enquiry, *Pratt v. Rutleis*, 546

REQUEST AND DEMAND.

Where bond is given for doing a thing which requires a demand, the bond is not forfeit till demand; and the defendant muſt take advantage of want of demand, by pleading *ſemper paratus*, *Levins v. Randall*, 413, 414

RESCUE.

1. Cannot be returned on writ of execution, *Anonymous*, 10

2. Reſcue returned, ſaid to be out of the hands of bailiffs, good, *Rex v. Giles*, 94

3. On *reſcous* returned, attachment goes of courſe without motion, *Anonymous*, 247

4. *Reſcous* returned is not traverſable, *Tracy's Caſe*, 556, 557

RESTITUTION.

1. On reverſal judgment is, that the party be reſtored to whatever he had loſt; and ſuggeſtion ſhould be, that he was ſeiſed of ſuch lands, and a *ſcire facias* be taken out againſt the terre-tenants, who may ſhew cauſe againſt reſtitution, *Dillon v. Walcot*, 407

2. On inquiſition of forcible entry quaſhed, reſtitution is not of courſe, *Anonymous*, 423

RETURN OF WRITS.

See SHERIFF.

1. To make *capias* returnable the ſame day ſummons is returnable is error, *Bidolph v. Veal*, 523

2. Fifteen days not neceſſary to return of a proceſs in a franchiſe, *Bidolph v. Veal*, 524

REVOCATION.

Action brought by principal is revocation of letter of attorney, *Anonymous*, 409

See WILLS.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

1. Where the inquiſition is on view, the ſheriff muſt be preſent; and though the

the ſtatute appoints it ſhall be within a month, under a penalty, that is only mandatory, and may be after, *Rex v. Page*, 123

2. If all except two indicted for a riot are acquitted, no judgment can be; but if it was *cum multis aliis, aliter*, *Rex v. Sudbury*, 262

RIVERS.

See HIGHWAYS.

RULES OF COURT.

1. Second *ſcire facias* ſhall not be taken out till the day of the return of the firſt, *Anonymous*, 94

2. If a man ſurrender himſelf on a judgment given againſt him, and he be not charged within two Terms after judgment, he ſhall be diſcharged on common bail, on producing a certificate from the clerk of the errors, that there is no writ of error depending, *Anonymous*, 132

3. Peremptory rule not to be without notice, *Anonymous*, 251

4. All deeds to be enrolled on the plea-ſide, and acknowledged in the face of the Court, *Regula Generalis*, 321

5. In debt againſt bail the principal may be ſurrendered, as on *ſcire facias*, on two *nihils* returned, *Watt's Caſe*, 351

RULES OF LAW.

See MAXIM.

S.

SCIRE FACIAS.

1. *Scire facias* was ſealed and delivered after the party's death; and held execution thereon good; and that the ſtatute of 29. Car. 2. c. 3. is only to be underſtood of the goods of a purchaſer, purchaſed before the delivery of the writ, *Dr. Needham's Caſe*, 5

2. No writ of error lies on a *ſcire facias* in the exchequer chamber, on a judgment affirmed there, *Hartop v. Hoh*, 10

3. Bail pleads payment before the return of the ſecond *ſcire facias*, and held ill; for the recognizance is forfeited before ſuing out the firſt, *Comier v. Bastard and Rawlins*, 111

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2. Statute appoints a ſpeedy remedy againſt quakers for tithes, *viz.* on complaint before juſtices of peace; this is only an additional remedy, and does not take away the juriſdiction of the ſpiritual court: but where the ſtatute alters the offence, and makes it of a higher degree, as in caſe of polygamy after a man has been tried for it, or where a man is adjudged the reputed father of a baſtard child, the ſpiritual court cannot proceed, *Rex v. Sancky and Tipper*, 165

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16. New trial often granted, not becauſe the verdict was bad, but that the matter required re-examination, *Peterborough v. Sadler*, 347, 348

17. If new trial be granted for irregularity, ſhall be no coſts; *aliter* if on the merits, *Anonymous*, 370

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20. On indictment for barretry, defendant ought to have copy of the articles which will be inſiſted on againſt him; and where there is a rule to give copy of articles, and that not complied with, the proſecutor ought not to be admitted to give evidence, *Rex v. Ward*, 516, 517

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8. No tithe lamb is due if there be not ten, becauſe are entire things, *Selby v. Bank*, 498

9. Germs of oak, which was not cut till after twenty years, not titheable; *aliter* if before, *Fox v. Thexton*, 524

10. *Modus* to pay two ſhillings in the pound, whether good, *Vinér v. Dodderidge*, 563

V. and U.

VACATION.

See TERM-TIME.

VAGABONDS AND VAGRANTS.

See POOR.

VARIANCE.

1. On writ of error, want of original aſſigned, and one was certified variant from the declaration, it ſhall be taken for the original in the action, *Jennifon v. Ellis*, 235
2. A *capias* was ſet forth, returnable *coram rege*; a *capias coram nobis apud Weſtm.* was produced; and held no material variance, *Worſenholm v. Manucaptors of Berks*, 599
3. Record taken before nine commiſſioners; one removed taken before eight is a material variance, *Worſenholm v. Manucaptors of Berks*, 600

VENUE.

See VISNE.

VERDICTS.

1. Time laid in declaration of aſſault and battery, which was after the verdict, it is helped by the verdict; had it been for a time before, the verdict had been ill, *Blackhall v. Eccles*, 102
2. Laying no particular time in treſpaſs helped by verdict, *Hall v. Dukes*, 105
3. In action on ſtatute of Hue and Cry, did not ſhew where the examination was within twenty days, good after verdict, *Gilbert v. Puddleſgate*, 242
4. Caſe by aſſignee of commiſſion of bankrupt, ſetting forth, that the bankrupt recovered againſt the teſtator, and that goods of that value came to his hands, which he converted, not ſaying where, had been ill on demurrer, but well after verdict, *Turner v. Man*, 306
5. Caſe for not delivering goods on or before a certain day, and that he was ready to receive at the day, but defendant did not deliver them; verdict for plaintiff; if delivery had been before the day, verdict had been for defendant; ſo cured by verdict, *Hammond v. Ouden*, 421, 422
6. *Quantum meruit* for meat and drink for ſeveral months, after verdict, good, *Snow v. Firebraſſe*, 434
7. Verdicts help ſuch faults as muſt be given in evidence to obtain a verdict, *Palmer v. Staveley*, 510
8. Debt brought by an executor for an eſcape of one in execution, on a judgment of teſtator in the *debet* and *detinet*, whether helped by verdict, *Holden v. Sutton*, 563

VILL.

See PARISH.

VISNE.

See ACTIONS IN GENERAL.

1. The whole hundred is the *vicinetus*, *Anonymous*, 49
2. In *ſcandalum magnatum* will not change the *venue* on common affidavit, *Duke of Norfolk v. Alderton*, 121
3. Action on eſcape is out of the rule for changing a *venue*, *Anonymous*, 204
4. On the act for compoſition of debts, muſt ſay where the compoſition was, *Dennis v. Roberts*, 249
5. Affidavit that if the words were ſpoke it was at *Lancaſter*; and as the Court could not order a trial there, the *venue* was changed to the next county, *Anonymous*, 313
6. Affidavit to hinder change of *venue* muſt be to give evidence of the matter in iſſue where the action is laid, *Anonymous*, 372
7. *Venue* in *ſcandalum magnatum* not changed, unleſs for extraordinary cauſe, *Biſhop of Bath v. Bridges*, 401
8. On affidavit to change *venue*, muſt be to one particular county, *Anonymous*, 442
9. Where a whole county is concerned in a trial, it ſhall be by a neighbouring county, and a ſuggeſtion made of it on the roll, *Anonymous*, 503
10. Perſonal action may be laid in any county; yet if cauſe of action appears to be in another, *venue* will be changed, *Hayward v. Kinſey*, 568

11. Never

11. Never changed in debt, *Anonymous*, 579

12. Not changed in covenant, *Anonymous*, 648

VISITATION.

The founder of a college and his heirs are viſitors; and *per* HOLT, It is doubtful whether the king may grant the inheritance of a viſitation, though may do it *pro tempore* to a perſon, *Anonymous*, 232, 233

UNIVERSITIES AND SCHOOLS.

See EXCOMMUNICATO CAPIENDO.

Whether a layman can be ſued in the ſpiritual court for teaching a ſchool without licence, it being prohibited under penalty ſo to do, by ſtatutes, *Oldfield v. Raines*, 192

USES AND TRUSTS.

1. Huſband and wife covenant to levy a fine of the wife's lands, to the uſe of the heirs of the huſband on the wife begotten, the limitation is void, *Davis v. Speed*, 38, 39

2. Conveyance by way of uſe to be conſtrued according to the intent of parties, *Lee v. Brace*, 101

3. If there be a deed to levy a fine at ſuch a time to ſuch perſons, a fine ſo levied ſhall not be averred to be to other uſes by any writing which is not a deed, *Jones v. Morley*, 160

4. But if the fine vary in any particular from the deed it may; but if nothing appears to the contrary, the fine ſhall, in conſtruction of law, be to the uſes of the deed, *Jones v. Morley*, 160, 161

5. Where a fine varies from a precedent deed, no parties are eſtopped to aver it was to other uſes: but in caſe of a ſubſequent deed, declaring the uſes of a precedent fine or recovery (though ſtrangers before the ſtatute of Frauds might), the conuſor or recoveror, or their heirs, cannot aver it was to other uſes, being eſtopped by their deed, *Jones v. Morley*, 161

6. If a uſe be declared on a tranſmutation of poſſeſſion, as in a fine or feoffment, there needs no agreement; but if it do not ariſe by tranſmutation of poſſeſſion, there muſt be ſome conſideration or agreement, 161

7. On bargain and ſale, the uſe would ariſe on payment of the money by parol without deed, *Jones v. Morley*, 162

8. But if it be in conſideration of blood, would not ariſe by parol without deed, for that is no conſideration to compel the execution, but muſt ariſe by deed, *ibid.*

USURY, EXTORTION, AND BARRETRY.

1. Uſurious contract pleaded in bar of debt on a bond, not ſaying defendant was indebted to plaintiff at the time of the bond, *Crow v. Brown*, 385

2. Bail to the action may plead uſurious contract, *Anonymous*, 493

3. In uſurious contract, the whole proof lies on the defendant, *Anonymous*, 517

4. In indictment for barretry, defendant ſhould have copy of the articles to be inſiſted on, that may have time to prepare for defence, *Rex v. Ward*, 516

W.

WAGER OF LAW.

1. On debt on a by-law, wager of law will not lie, *City of London v. Wood*, 669

2. Where wager of law is inſtead of concluding to the country, judgment final, *City of London v. Wood*, 678

3. Wherever a man is charged with a penalty for a wrong done, it lies not, *City of London v. Wood*, 677

4. Plaintiff on bringing witneſſes, and averring *Magna Charta*, may compel the defendant to wage his law, *City of London v. Wood*, 679

5. Secrecy

5. Secrecy is the reaſon of wager of law, ſo will not lie on a by-law, which is notorious, 679

6. Lies on account againſt receiver, for money received by the plaintiff, not by another, *ibid.*

7. In account againſt bailiff of a manor will not lie, becauſe notorious, *City of London v. Wood*, 681

8. HOLT doubted whether it would lie on judgment in court baron for an amerciament, *ibid.*

WAGES.

See MASTER *and* SERVANT.

WARRANTY.

1. Collateral warranty was for the ſecurity of purchaſers, and of thoſe who were in by title at common law; at which time there was no need of lineal warranty, *Anonymous*, 512

2. Common recoveries not on the ſuppoſal of recompence, but as being never within the ſtatute; *per* HOLT, *ibid.*

WILLS.

1. If the teſtator might ſee the witneſſes ſubſcribe, though did not actually, it is a good ſubſcription in his preſence, within the ſtatute of Frauds, *Day and Nichols v. Smith*, 37

2. *Per* HOLT, Probate is ſufficient proof of a will, *Rex v. Rains*, 136

3. A will of a perſonal eſtate made before marriage, preſumed to be revoked by a ſubſequent marriage, *Lugg v. Lugg*, 236

4. Deviſee no good witneſs to a will, *Hilliard v. Jennings*, 276

5. But ſee now 25. Geo. 2. c. 6. and the caſe cited, 277 *notis.*

WITNESSES.

See EVIDENCE.

1. If there be ſeveral defendants in an information, ſome of whom have not pleaded, on the Attorney General's entering a *non proſ.* as to them, they are good witneſſes, *Anonymous*, 40

2. Witneſs who had ſuffered infamous judgment, not for a crime *ſua natura* infamous, doubted whether good evidence; but the act of pardon gives him new credit, *Rex v. Croſby*, 72

3. On uſurious contract the bond is part of the crime, and party not to prove it, *Rex v. Warden of the Fleet*, 339

4. Witneſs may be admitted out of neceſſity; as on the ſtatute of Hue and Cry the perſon robbed may, *Rex v. Warden of the Fleet*, 340

5. A perſon prejudiced by a will admitted to prove it forged, *ibid.*

6. If diſability ariſe by act of parliament, and be part of the judgment, the king cannot pardon; but if it be only conſequential, he may, *ibid.*

7. Burning in the hand does not impeach the credit of a witneſs, unleſs the crime for which it was affects it; as if it be for ſtealing, *Rex v. Warden of the Fleet*, 341

8. Attorney cannot be a witneſs in reſpect of a cauſe where he had been concerned; againſt the opinion of HOLT, who held he ought to declare any thing he knew not as attorney, *ibid.*

9. In an action on a bill of exchange, the drawer of the bill of exchange was not admitted a witneſs to prove he did not draw it, *Anonymous*, 345

10. Perſon claiming the like intereſt with that in controverſy, though under a different title, no witneſs, *Caſe of the Farmers of Newgate Market*, 372

11. Perſon not ſuffered to diſcredit a witneſs of his own calling, *Adams v. Arnold*, 375

12. On ſuit by creditor againſt executor, legatee admitted to prove aſſets, *Anonymous*, 385

13. Depoſitions of a witneſs taken before a Judge, and croſs-examined, not to be read, if the party might have had him at the trial, *Anonymous*, 493

14. Party

14. Party oppreſſed good evidence on indictment for the oppreſſion, *Anonymous*, 512

15. Whether thief be a good witneſs to prove the receiving goods ſtolen, knowing them ſo, *Rex v. Croſs*, 520

WITHERNAM.

See REPLEVIN.

WORDS SUABLE IN THE SPIRITUAL COURT, OR NOT.

See PROHIBITION.

1. Calling a clergyman knave, not, *Nelſon v. Hawkins*, 104

2. Calling a clergyman blockhead, not ſuable there, *Coxeter v. Parſon*, 231

3. Calling a woman "whore, and pocky "whore," not ſuable there, for action lies at common law, *Grimes v. Level*, 242

4. Suit for calling a woman whore, ſuggeſted to be ſpoke in *London*, prohibited, *Toſen v. Skipper*, 495

WORDS ACTIONABLE AT LAW, OR NOT.

1. Saying a woman had a baſtard to hinder her of her marriage with *A.* which was then in agitation, not actionable, *Byron v. Emes*, 106

2. "Thou haſt nothing but what thou "haſt got by cheating and cozening," without averring he was of a trade, not actionable, *Bromefield v. Snoke*, 307

3. Action by pawnbroker, of whom ſaid, "Thou art a broken fellow," and laid and proved a loſs, *Anonymous*, 344

4. Words ſpoke of a tradeſman, that "He is a cheat;" not actionable without a *colloquium* of his trade, *Bennet v. Wells*, 420

5. "He has nothing but rotten goods in "his ſhop," and *colloquium* of his trade; actionable, *ibid.*

6. To ſay to *a milliner*, "Thou art a "beggarly fellow, and not worth a "groat," actionable, without ſpecial damage, *Simpſon v. Barlow*, 591

7. Caſe for calling a woman whore, by which ſhe loſt her marriage, will not lie, without ſhewing who the perſon was, *Wetherell v. Clarkſon*, 597

8. Where words are only actionable in reſpect of the ſpecial loſs, that muſt be ſet forth in certain, for it is iſſuable, *ibid.*

9. "Thou art a pocky whore," actionable, *Clifton v. Wells*, 633

WORDS NOT INDICTABLE.

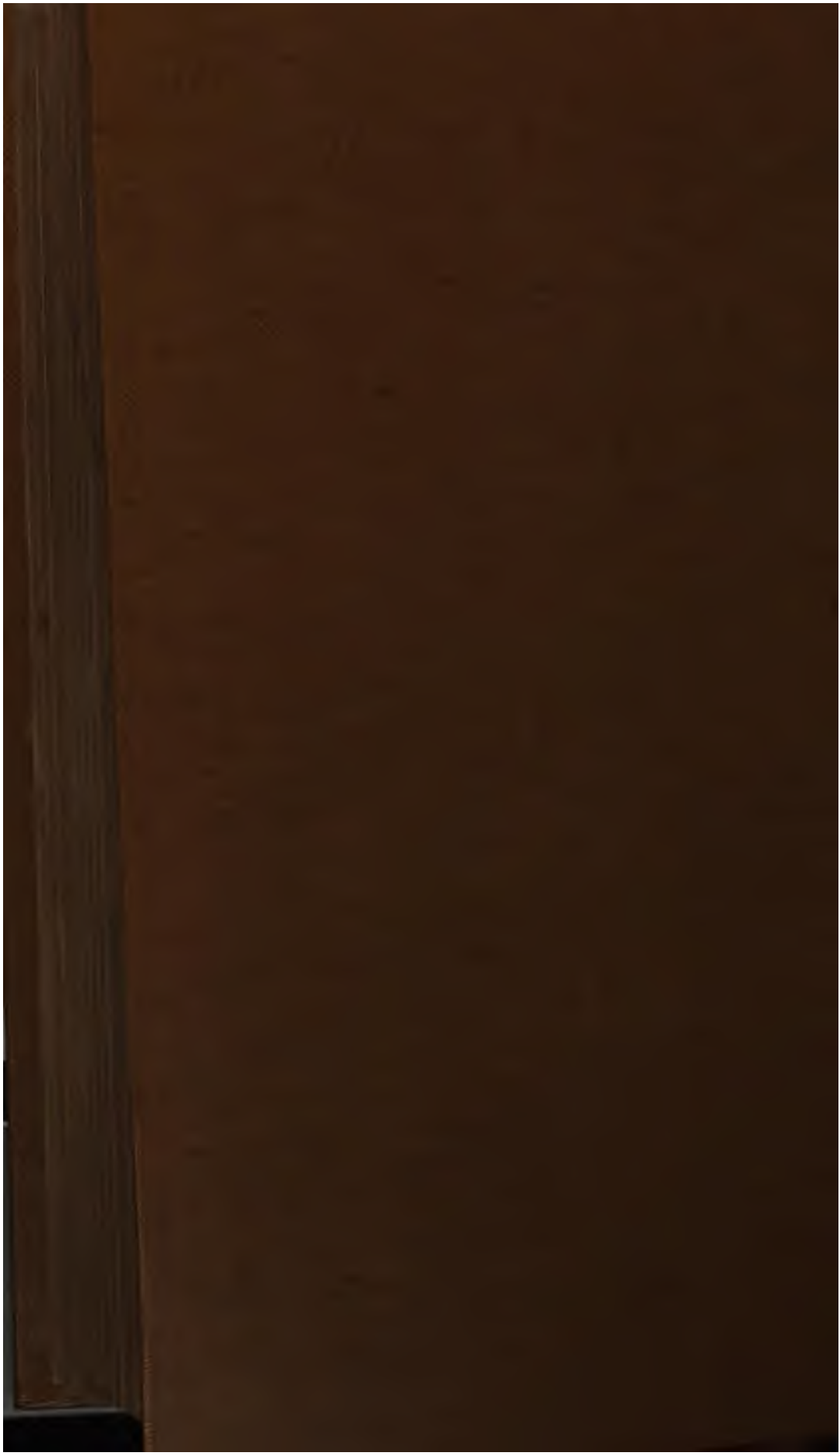
1. "The mayor and aldermen of *A.* "are a pack of as great villains as "any that rob on the highway;" not indictable, *Rex v. Grandfield*, 98

2. Would not ſuffer information to be filed for ſaying of a juſtice of peace, "He is an old rogue," *Rex v. Lee*, 514

WRITS.

See DAMAGES.

1. *Capias* made returnable the ſame day the ſummons was returnable in error, *Bidolph v. Veal*, 523

2. A perſon in the Counter for want of bail had a *ne exeat regnum* iſſued againſt him; may be brought up by *habeas corpus*, to be charged with an action in *B. R. Nailer's Caſe*, 562, 563

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